SUPREME COURT, U.S.
FILED

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No.

IN THE

Supreme Court of the United States

SAM MCINNIS AND TIM SHINGLETON,
Petitioners,

v.

PAMELA ALICE LITTLE DANIEL, AS ADMINISTRATRIX OF THE ESTATE OF JOE ED DANIEL,
Respondent.

On Petition For A Writ Of Certiorari To The Supreme Court Of Alabama

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether a defendant can be subjected to personal jurisdiction consistent with the Due Process Clause when his limited contacts with the forum have no causal nexus or relationship to the plaintiff's cause of action.

2. Whether a defendant can be subjected to personal jurisdiction consistent with the Due Process Clause based on the attributed conduct of other parties and the plaintiff's mere allegations of reprehensible conduct.

PARTIES TO THE PROCEEDING

In addition to the parties named in the caption, Michael Borka was a party to the proceedings in the court below. Additional defendants were named in the separately captioned trial court proceedings but were not parties in the court below, including Nationwide Industries, Inc.; Pandora Manufacturing, Inc.; Pennzoil-Quaker State Co.; Hughtone Industries, Inc. and its owner/officer Paul Hughett; Montfort A. Johnsen and Associates, Ltd. and its owner/officer Montfort A. Johnsen; Safety Consulting Engineers, Inc. and its owner/officer or employee James C. Dahn; Sweat Tire Company, Inc.; and Aerofil Technologies, Inc.

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PETITION FOR A WRIT OF CERTIORARI

Petitioners Sam McInnis and Tim Shingleton respectfully petition this Court for a writ of certiorari to review the judgment of the Supreme Court of Alabama in this case. The decision below exacerbates the existing conflicts among the state and lower federal courts on the questions presented. By holding that very limited contacts with the forum state that have nothing to do with the plaintiff's cause of action can nonetheless support the exercise of personal jurisdiction over non-resident defendants, the Alabama Supreme Court has violated the requirements of the Due Process Clause. By further holding that this jurisdictional defect can be cured by attributing to defendants the actions of other parties and by the plaintiff's allegations of reprehensible conduct, the Alabama Supreme Court has taken an extreme position that would justify personal jurisdiction in almost any case. The formulation of the law created by the court below eviscerates the "minimum contacts" regime established by this Court to guard against overbroad assertions of personal jurisdiction.

OPINIONS BELOW

The opinion of the Supreme Court of Alabama (App., *infra*, 1a-26a) is not yet published, but is unofficially reported at 2001 Ala. LEXIS 403. The order of the trial court (App., *infra*, 27a) is not reported.

JURISDICTION

The judgment of the Supreme Court of Alabama was entered on November 2, 2001. On January 25, 2002, Justice Kennedy extended the time for filing a petition for a writ of certiorari to and including March 4, 2002. *See* Applic. No. 01A544.

The jurisdiction of this Court rests upon 28 U.S.C. § 1257(a). Petitioners filed an original petition for a writ of mandamus in the Supreme Court of Alabama seeking a determination that the state trial court in the underlying litiga-

tion lacked personal jurisdiction over petitioners. The judgment below denied petitioners' original petition, and accordingly it constitutes a "final decision" within the meaning of 28 U.S.C. § 1257(a). *See Mt. Vernon-Woodbury Cotton Duck Co. v. Alabama Interstate Power Co.*, 240 U.S. 30, 31 (1916) (holding that Alabama judgment deciding a writ of prohibition concerning jurisdiction constitutes a separate suit and is a "final judgment"). As this Court has held, "[a] judgment that terminates original proceedings in a state appellate court, in which the only issue decided concerns the jurisdiction of a lower state court, is final, even if further proceedings are to be had in the lower court." *Fisher v. District Court*, 424 U.S. 382, 385 n.7 (1976).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Due Process Clause of the Fourteenth Amendment to the Constitution of the United States provides, in pertinent part:

> "No State shall . . . deprive any person of life, liberty, or property without due process of law."

U.S. CONST. amend. XIV, § 1.

STATEMENT OF THE CASE

This Court has approved the exercise of long-arm jurisdiction in cases arising out of or relating to a non-resident's contacts with the forum state, *e.g., Helicopteros Nacionales de Colombia, S.A. v. Hall*, 466 U.S. 408, 414 (1984), but has expressly left open the question of the appropriate test for determining whether a defendant's contacts are sufficiently related to the cause of action to justify the assertion of personal jurisdiction (*id.* at 415 n.10). As a result, the lower state and federal courts are increasingly confused and divided over that question. This Court granted certiorari to decide that question in *Carnival Cruise Lines, Inc. v. Shute*, 498 U.S. 807 (1990), but ultimately decided the case on other grounds, 499 U.S. 585, 589 (1991). In the intervening years, the dis-

agreement among the lower courts has continued to widen, and some courts have further intensified the confusion and uncertainty in this area of the law by steadily extending the outer boundaries of the "relatedness" concept.

The decision of the Supreme Court of Alabama in this case is the latest example of that troubling trend. The decision below renders the relatedness requirement effectively superfluous, and supplants this Court's traditional "minimum contacts" framework with an amorphous and standardless sliding scale based on the vicarious attribution of other defendants' contacts and a subjective examination of the perceived "reprehensibility" of the defendant's alleged out-of-state conduct. For the reasons set forth below, this Court's review is necessary to resolve the existing conflict and confusion concerning the proper test for "relatedness," and to reaffirm the long-standing due process requirement that a state's exercise of long-arm jurisdiction must be based on the minimum contacts of each individual defendant over whom jurisdiction is asserted.

I. Factual Background

This case arises out of a wrongful death suit filed by respondent in Alabama state court. At all times relevant to this case, petitioners Sam McInnis and Tim Shingleton were residents of North Carolina. App., *infra*, 3a. Between 1993 and 1997, petitioners were officers or employees of Snap Products Inc. ("Snap"), a North Carolina corporation located in North Carolina. *Id.* at 10a. McInnis was employed as Snap's Vice-President of Sales, and later as Chief Executive Officer. Shingleton worked for Snap as Regional Sales Manager, Vice-President of Sales, and finally as President of Operations. *Id.* From 1995 through 1997, petitioners were also shareholders in Snap's corporate parent, Snap Automotive Products, Inc. ("Snap Products"), a Delaware corporation with its principal place of business in North Carolina. *Id.* at 6a.

During the relevant time period, Snap marketed more than 70 products nationwide, including a "Fix-a-Flat" prod-

uct designed to inflate flat car tires rapidly in emergency situations. App., *infra*, 9a. In the course of their duties as employees of Snap, petitioners occasionally traveled to Alabama on company business. Specifically, in 1994 or 1995, McInnis traveled once to Alabama on behalf of Snap to visit an existing customer. *Id.* at 9a. The purpose of this visit was to encourage the customer to carry Snap's entry-level line of products, a line that did not include the Fix-a-Flat product. *Id.* at 10a. The customer declined to carry the line and purchased no new Snap products as a result of the visit.

Similarly, Shingleton traveled to Alabama on behalf of Snap a total of four times between 1992 and 1995. App., *infra*, 8a. Two of those trips were to visit a potential customer in Tuscaloosa; that customer eventually purchased some of Snap's product line, but not the Fix-a-Flat product. *Id.* at 8a. The third trip was to visit a potential customer in Birmingham, and the fourth trip was to visit a representative of several local distributors in Mobile. Both of these trips focused on Snap's entire product line, not specifically the Fix-a-Flat product. *Id.* at 8a-9a. None of Shingleton's trips to Alabama specifically concerned the Fix-a-Flat product, and none of the trips resulted directly in the sale of that product in Alabama. *Id.* at 9a-10a.

On December 18, 1998, respondent filed suit in Alabama state court against Snap, its corporate parent Snap Products, its corporate officers McInnis, Shingleton, and Michael Borka, and other defendants. Respondent's complaint alleges that "[a]t all times relevant hereto," the corporate defendants "were engaged in the business of manufacturing and marketing" the Fix-a-Flat product "throughout the United States, including the state of Alabama," and that petitioners "were either employed in managerial capacities, or were owners and/or officers of [the defendant corporations] and in such capacities acted as agents of the companies." App., *infra*, 29a ¶¶ 4, 11. The complaint further alleges that the Fix-a-Flat product tortiously caused the death of Joe Ed Daniel on June 4, 1997, when it exploded while he was welding on the rim of a commercial road grader tire that had allegedly

been inflated using the product. *Id.* at 29a-30a ¶¶ 67-68. Respondent seeks damages for the alleged wrongful death of Daniel.

In the state trial court proceeding, petitioners filed motions to dismiss the complaint for want of personal jurisdiction. Each petitioner argued that he lacked the requisite minimum contacts with Alabama necessary to permit the Alabama courts to exercise personal jurisdiction over him consistent with the Due Process Clause of the Fourteenth Amendment, and submitted affidavits in support of the motion to dismiss. The parties agreed that petitioners could refrain from answering the allegations in respondent's complaint until after their motions to dismiss for lack of personal jurisdiction were finally decided. *See* App., *infra*, 3a.

The state trial court denied petitioners' motions to dismiss. App., *infra*, 27a. Petitioners filed a motion requesting that the trial court reconsider and reverse its denial of the motions to dismiss or, in the alternative, amend its order denying the motions to dismiss so as to allow the individual defendants to petition the Supreme Court for permission to appeal the trial court's denial of the motions. Petitioners' motion was denied without written opinion.

II. Proceedings In The Court Below

Petitioners then filed an original petition for a writ of mandamus in the Supreme Court of Alabama, requesting that court to direct the trial court to grant petitioners' motions to dismiss for want of personal jurisdiction. The Supreme Court of Alabama denied petitioners' mandamus petition in an opinion to be published in the Southern Reporter. App., *infra*, 1a-26a.[1]

After noting that Alabama law "extends the personal jurisdiction of Alabama courts to the limit of due process under

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[1] The court granted mandamus relief with respect to a third individual defendant, Michael Borka. *Id.* at 2a.

the federal and state constitutions," App., *infra*, 10a, the supreme court held that the "stream of commerce" analysis of *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286 (1980), and *Asahi Metal Industry Co., Ltd. v. Superior Court*, 480 U.S. 102 (1987), established the proper framework for analyzing the due process claims raised by petitioners, even though the Fix-a-Flat product was allegedly placed into the "stream of commerce" by Snap and/or the other corporate defendants. App., *infra*, 14a-15a. Relying on its understanding of *Asahi* and *World-Wide*, the court purported to examine whether petitioners "engage[d] in actions 'purposefully directed toward the forum State' so as to 'indicate an intent or purpose to serve the market in the forum State.'" *Id.* at 15a (citation omitted).

With respect to McInnis, the court noted that he had made one trip to Alabama in an unsuccessful attempt to convince an existing customer to carry Snap's "entry-level" product line—a product line that did not include the Fix-a-Flat product. App., *infra*, 17a. The court concluded, however, that "[t]he trip was still 'an act of the defendant purposefully directed toward the forum State' with 'an intent or purpose to serve the market in the forum State.'" *Id.* at 17a (citation omitted). The court reasoned that, "[h]ad the trip succeeded, it would have promoted not only the particular products accepted by Carport but also the brand name itself." *Id.*

In addition, the court found it significant that, for purposes of the motion to dismiss, petitioner McInnis "does not deny any of the substantive allegations of [respondent's] pleadings." App., *infra*, 17a. In particular, the court stated that McInnis did not deny that he was aware of the product's explosiveness and "that he learned of the three injuries caused by explosions of the product in 1995 and 1996 similar to the explosion which would kill Mr. Daniel in 1997." *Id.* The court also asserted that McInnis did not deny that, "with full knowledge of the explosiveness of the product and the injuries from it, he decided not to recall or to re-label the product." *Id.* In the court's view, the allegedly "reprehensi-

ble extent of McInnis's culpability, as established by the pleadings for the limited purpose of deciding his . . . motion to dismiss, increases the importance of McInnis's contacts with Alabama enough that" the assertion of personal jurisdiction was appropriate. App., *infra*, 17a.

With respect to Shingleton, the supreme court stated that he "visited Alabama four times" between 1992 and 1995 to market Snap's entire product line of more than 70 products. App., *infra*, 15a-16a. The court also thought it important that, for purposes of the motion to dismiss, Shingleton did "not dispute the plaintiff's allegations that Shingleton knew of the explosiveness of the Fix-A-Flat product, that he knew of the actual explosions which injured three men other than Mr. Daniel in 1995 and 1996, and that he participated in the decision thereafter not to recall or to re-label the product." *Id.* at 16a. The court concluded that the assertion of personal jurisdiction over Shingleton was appropriate because, in its view, Shingleton's actions were "purposefully directed toward the 'forum State' and 'indicate an intent or purpose to serve the market in the forum State." App., *infra*, 16a (citation omitted).

Justice Lyons, joined by Justices See and Brown, dissented from the majority's conclusion that personal jurisdiction existed over McInnis. App., *infra*, 22a-26a. The dissent objected that "[t]he majority opinion improperly displaces the long-standing constitutional requirement of 'minimum contacts' with a new, sliding scale based upon subjective views of the reprehensibility of the defendant's alleged conduct." *Id.* at 22a. As the dissent explained, "[t]he majority opinion cites no authority for its proposition that the reprehensibility of a nonresident defendant's conduct so 'increases the importance' of a defendant's single contact with a state as to make constitutional an otherwise unconstitutional exercise of *in personam* jurisdiction." *Id.* at 24a (citation omitted).

The dissent concluded that McInnis lacked sufficient contacts with Alabama to justify the assertion of personal jurisdiction over him. The dissent reasoned that McInnis's one visit to Alabama "cannot be the proximate cause of the dece-

dent's injuries because no sale of the Fix-A-Flat product was made as a result of his visit." App., *infra*, 23a. The dissent accordingly concluded that "[b]ecause the decedent's death did not arise from, or represent a clear, firm nexus to, McInnis's one contact with Alabama, the trial court cannot obtain specific personal jurisdiction over McInnis." *Id.* at 23a-24a.

III. How The Federal Question Was Presented

Petitioners raised their federal due process objection to the exercise of personal jurisdiction over them at every stage of the proceedings below. Petitioners sought dismissal in the trial court on the ground that they lacked sufficient contact with Alabama to justify that state's exercise of personal jurisdiction. Thus, McInnis argued that "[a] non-resident individual is not subject to the jurisdiction of the Alabama courts unless he has sufficient 'minimum contacts' with Alabama so that the exercise of *in personam* jurisdiction is consistent with the Due Process Clause of the Fourteenth Amendment." Mem. in Supp. of Motion of Sam McInnis to Dismiss for Lack of Personal Jurisdiction (Special Appearance) at 3. Similarly, Shingleton argued to the trial court that it must "look to [his] personal contacts with Alabama in order to exercise personal jurisdiction over him consistent with due process." Motion of Michael Borka and Tim Shingleton to Dismiss for Lack of Personal Jurisdiction (Special Appearance) at 1.

Petitioners expressly raised their federal constitutional claims in their original petition for a writ of mandamus in the Supreme Court of Alabama. In particular, petitioners argued that they "lack the requisite 'minimum contacts' with Alabama sufficient to make the exercise of personal jurisdiction by Alabama's courts consistent with the Due Process Clause of the Fourteenth Amendment." Petition for Writ of Mandamus of Defendants, Sam McInnis, Michael Borka and Tim Shingleton at 8. Petitioners further argued that "[t]he status of the individual defendants as employees or officers of Snap Products is *insufficient as a matter of law* to subject the individual defendants to the jurisdiction of Alabama's courts,"

and that "the single visit of Mr. McInnis and the limited visits by Mr. Shingleton to Alabama are insufficient to establish jurisdiction over those defendants because the plaintiff's claims do not arise out of those visits." *Id.* at 9.

REASONS FOR GRANTING THE WRIT

I. Review Is Necessary To Establish The Proper Test For Determining Whether A Claim Arises Out Of Or Relates To The Defendant's Contacts With The Forum

The Due Process Clause of the Fourteenth Amendment precludes the exercise of state court personal jurisdiction over a non-resident defendant unless that defendant has the requisite "minimum contacts" with the forum state such "that the maintenance of the suit does not offend 'traditional notions of fair play and substantial justice.'" *International Shoe Co. v. Washington*, 326 U.S. 310, 316 (1945), *quoting Milliken v. Meyer*, 311 U.S. 457, 463 (1940). Where, as here, a state court asserts specific personal jurisdiction over a defendant,[2] the requirement of minimum contacts is satisfied only if both (1) the non-resident defendant "'purposefully directed his activities at residents of the forum," and (2) "*the litigation results from alleged injuries that 'arise out of or relate to' those activities*." *Burger King Corp. v. Rudzewicz*, 471 U.S. 462, 472 (1985) (citations omitted; emphasis added). If those two elements are established, courts must then consider a third factor: Whether the exercise of personal

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[2] When a State "exercises personal jurisdiction over a defendant in a suit arising out of or related to the defendant's contacts with the forum, the State is exercising 'specific jurisdiction' over the defendant." *Helicopteros*, 466 U.S. at 414 n.8. In contrast, general jurisdiction arises when the defendant's contacts with the forum state are so "continuous and systematic" that a state may exercise jurisdiction over *all* claims against the defendant, even those entirely unrelated to the defendant's contacts with the forum state. *Helicopteros*, 466 U.S. at 414 n.9 & 416; *Perkins v. Benguet Consol. Mining Co.*, 342 U.S. 437, 438 (1952).

jurisdiction comports with "fair play and substantial justice." *Burger King*, 471 U.S. at 476.

This Court has addressed the "purposefully directed" prong of the minimum contacts inquiry on numerous occasions, but has yet to specify the proper test for determining whether a plaintiff's injuries "arise out of or relate to" the defendant's contacts with the forum. *See United States v. Swiss Am. Bank, Ltd.*, 274 F.3d 610, 621 (1st Cir. 2001) ("[t]he requirement that a suit arise out of, or be related to, the defendant's in-forum activities comprises the least developed prong of the due process inquiry") (citation omitted). In *Helicopteros*, for example, this Court acknowledged but expressly declined to resolve the issue of "what sort of tie between a cause of action and a defendant's contacts with a forum is necessary to a determination that either connection exists." 466 U.S. at 415 n.10.

Subsequently, in *Carnival Cruise Lines, Inc. v. Shute*, 498 U.S. 807 (1990), this Court granted certiorari to resolve the question left open in *Helicopteros*. *See* Pet. for Cert. in No. 89-1647 at i ("Can a long-arm statute constitutionally reach a defendant whose activities in the forum state are insubstantial and bear only a tenuous relationship to the cause of action?"). Ultimately, however, the Court decided that case on other grounds and did not reach the "relatedness" issue. *See Carnival Cruise Lines, Inc. v. Shute*, 499 U.S. 585, 589 (1991) ("we need not consider petitioner's constitutional argument as to personal jurisdiction"). This case presents precisely the same issue for which certiorari was granted in *Carnival*.

Because *Carnival* did not reach the due process issue, it has been left to the lower state and federal courts to determine the requisite degree of "relatedness" between a defendant's forum activities and the plaintiff's claim. *See, e.g.*, *Akro Corp. v. Luker*, 45 F.3d 1541, 1547 (Fed. Cir. 1995) (noting the absence of any "general pronouncements" from this Court "on the nexus required to satisfy th[e] 'arise out of or relate to' prong of the due process inquiry"); *Vons Cos. v. Seabest Foods, Inc.*, 926 P.2d 1085, 1096 n.4 (Cal. 1996)

("[t]he high court has declined to clarify the relatedness element of specific jurisdiction"); *Thomason v. Chemical Bank*, 661 A.2d 595, 600 (Conn. 1995) ("[the Supreme C]ourt has not articulated a standard for what constitutes 'arising out of'").

As demonstrated below, the lower state and federal courts have adopted multiple conflicting approaches to this issue. The division of authority over the governing test for "relatedness" continues to widen, and is further exacerbated by the decision below. This case presents an opportunity for this Court to resolve this important question and eliminate the existing uncertainty in the lower courts over this recurring issue.

A. There Is A Three- Or Four-Way Conflict Among The Lower Courts Concerning The Necessary Relationship Between The Plaintiff's Cause Of Action And The Defendant's Contacts With The Forum

The law is clear that a "court's exercise of specific jurisdiction is appropriate only when the nonresident defendant's contacts with the forum state arise from, or are directly related to, the cause of action." *Gundle Lining Constr. Corp. v. Adams County Asphalt, Inc.*, 85 F.3d 201, 205 (5th Cir. 1996) (citing *Helicopteros*, 466 U.S. at 414 n.8). There is widespread confusion and disagreement among federal and state appellate courts, however, concerning the proper test for determining whether this "relatedness" requirement has been satisfied. Indeed, numerous courts have expressly recognized the existence of a substantial and continuing conflict among the authorities on this question.[3] Commentators have

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[3] *See, e.g., Chew v. Dietrich*, 143 F.3d 24, 29 (2d Cir. 1998) (noting existence of a "split in the Circuits on the standard to be applied in determining if a tort claim 'relates' to the defendant's activities within the state"); *Williams v. Lakeview*, 13 P.3d 280, 283 (Ariz. 2000) ("[f]ederal courts have disagreed about the strength of the causal relationship that must exist between a defendant's forum activities and a plaintiff's

[Footnote continued on next page]

likewise noted the division and confusion among federal and state courts over this issue.[4]

Three principal lines of authority have developed in the nearly two decades since this Court noted, but declined to resolve, this open question in *Helicopteros*. Many courts have held that specific jurisdiction requires a causal relationship between the defendant's forum activities and the cause of action, but these courts are divided over the nature of the requisite causal nexus, with some courts concluding that "but for"

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claim"); *Shoppers Food Warehouse v. Moreno*, 746 A.2d 320, 333 (D.C.) (en banc) ("jurisdictions have wrestled with the nexus requirement of specific jurisdiction in a variety of factual settings and have reached diverse conclusions as to the appropriate test for determining the proper nexus between the nonresident defendant's business activity and the claim asserted by the plaintiff"), *cert. denied*, 530 U.S. 1270 (2000).

[4] *See, e.g.*, Lawrence W. Moore, *The Relatedness Problem in Specific Jurisdiction*, 37 IDAHO L. REV. 583, 584 (2001) ("Although the formulas for general and specific jurisdiction suggest that the arising or related requirement presents problems for each, the source of the confusion is with specific jurisdiction."); Linda Sandstrom Simard, *Hybrid Personal Jurisdiction: Its Not General Jurisdiction or Specific Jurisdiction, but Is It Constitutional?*, 48 CASE W. RES. L. REV. 559, 579 n.91 (1998) ("To date, the Supreme Court has provided very little guidance on how the nexus requirement may be satisfied. . . . In the absence of guidance from the Court, lower courts and commentators have struggled with various interpretations of the nexus requirement."); Christopher D. Cameron & Kevin R. Johnson, *Death of a Salesman? Forum Shopping and Outcome Determination Under International Shoe*, 28 U.C. DAVIS L. REV. 769, 771 n.4 (1995) ("Since the Supreme Court adopted this bifurcated mode of analysis in *Helicopteros Nacionales de Columbia, S.A. v. Hall*, 466 U.S. 408 (1984), lower courts have grappled with defining the link between a dispute and defendant's contacts with the forum state necessary for the exercise of specific jurisdiction."); Alex Wilson Albright, *In Personam Jurisdiction: A Confused And Inappropriate Substitute for Forum Non Conveniens*, 71 TEX L. REV. 351, 380 (1992) ("Texas's confusion over specific and general jurisdiction is not surprising. Because of the Supreme Court's lack of guidance concerning whether a cause of action "arises from" contacts or whether the contacts are "continuous and systematic," many lower courts manipulate the parameters of specific and general jurisdiction to reach the desired result in a particular case.").

cause suffices while others require a showing of "proximate" cause. In addition to these two approaches, other jurisdictions have dispensed with a causal requirement altogether, focusing instead on whether there exists some (increasingly amorphous) connection between the forum contacts and the cause of action.

1. The First Circuit "has been recognized as the main proponent of the proximate cause standard" of relatedness. *Nowak v Tak How Invs., Ltd.*, 94 F.3d 708, 715 (1st Cir. 1996). The test is well illustrated in *Massachusetts School of Law at Andover, Inc. v. American Bar Ass'n*, 142 F.3d 26 (1st Cir. 1998), where the Court explained that in tort cases, "we customarily look to whether the plaintiff has established 'cause in fact (i.e., the injury would not have occurred 'but for' the defendant's forum-state activity) and legal cause (i.e., the defendant's in-state conduct gave birth to the cause of action)." *Id.* at 35 (citations omitted); *see also Swiss Am. Bank*, 274 F.3d at 622 ("[t]he relatedness inquiry for tort claims focuses on whether the defendant's in-forum conduct caused the injury or gave rise to the cause of action"); *United Elec. Workers v. 163 Pleasant St. Corp.*, 960 F.2d 1080, 1089 (1st Cir. 1992) (noting that the proximate cause test requires a claimant to show that jurisdiction is premised on a contact that "form[s] an important, or [at least] material, element of proof in the plaintiff's case"). Only if this "proximate cause" test is satisfied will specific jurisdiction be found to exist in cases governed by the First Circuit's approach.

In addition to the First Circuit, a number of other federal courts require a close causal nexus between a defendant's contacts and a plaintiff's substantive claims. *See, e.g., RAR, Inc. v. Turner Diesel, Ltd.*, 107 F.3d 1272, 1277 (7th Cir. 1997) (rejecting the use of a "loose causal connection" test and noting that in order for specific jurisdiction to exist in a breach of contract case, "past contacts involving the forum state should either bear on the substantive legal dispute between the parties or inform the court regarding the economic substance of the contract"); *see also Chew v. Dietrich*, 143

F.3d 24, 29 (2d Cir. 1998) ("[w]here the defendant has had only limited contacts with the state, it may be appropriate to say he will be subject to suit in that state only if plaintiff's injury was proximately caused by those contacts"). Clearly, there can be no personal jurisdiction over petitioners under the "proximate cause" test.

2. In contrast to this "proximate cause" approach, appellate courts in several other jurisdictions have held that this Court's relatedness requirement can be satisfied with a considerably less restrictive standard of causation that requires only that the non-resident defendant's contacts be a "cause in fact" or "but for" cause of the plaintiff's injury. The Ninth Circuit is "the most forceful defender of the 'but for' test." *Nowak*, 94 F.3d at 714. In *Shute v. Carnival Cruise Lines*, 897 F.2d 377 (9th Cir. 1990), *rev'd on other grounds*, 499 U.S. 585 (1991), the Ninth Circuit expressly adopted the "but for" test and held that the relatedness requirement was satisfied because, "but for" the defendant's advertising in the forum state, the plaintiff would not have taken the cruise on which she was injured. *Id.* at 386. Although *Shute* was reversed on other grounds, the Ninth Circuit has adhered to and reaffirmed the "but for" test in subsequent cases. *See Doe v. American Nat'l Red Cross*, 112 F.3d 1048, 1052 (9th Cir. 1997) (noting that "the 'but for' test is still employed in determining whether a plaintiff's injuries arose out of a defendant's forum-related activities"); *Ballard v. Savage*, 65 F.3d 1495, 1500 (9th Cir. 1995) ("[w]e rely on a 'but for' test to determine whether a particular claim arises out of forum-related activities and thereby satisfies the second requirement for specific jurisdiction").

The Supreme Court of Massachusetts has also adopted this "but for" approach. In *Tatro v. Manor Care, Inc.*, 625 N.E.2d 549 (Mass. 1994), the court expressly rejected the proximate cause test, and criticized the First Circuit cases adopting that test. *Id.* at 553. Instead, the Massachusetts court cited with approval the Ninth Circuit's line of cases adopting the "but for" test. *Id.* Applying the latter test, the court held that specific jurisdiction existed over the non-

resident defendant in that case because, "*[b]ut for* the defendant's solicitation of business in Massachusetts, and its agreement to provide the plaintiff with hotel accommodations in Anaheim, California, the plaintiff would not have been injured." *Id.* at 554 (emphasis added); *see also id.* (concluding that "but for" test satisfies due process). *See also Prejean v. Sonatrach, Inc.*, 652 F.2d 1260, 1270 n.21 (5th Cir. Unit A Aug. 1981) (suggesting that a contract-based contact with a forum could provide support for an assertion of personal jurisdiction in a tort case where the "contractual contact is a but for causative factor for the tort since it brought the parties within tortious 'striking distance' of each other").

The "but for" test does not support jurisdiction over petitioners. That jurisdiction cannot be upheld even under the attenuated and amorphous standard to be discussed next.

3. Numerous other appellate courts have rejected any requirement of a causal nexus between the defendant's forum contacts and the cause of action, instead adopting a far more relaxed standard of relatedness. These courts hold that specific jurisdiction exists as long as there is a "substantial" or even "discernible" connection between a non-resident's contacts and the cause of action.

In *Shoppers Food Warehouse v. Moreno*, 746 A.2d 320 (D.C.) (en banc), *cert. denied*, 530 U.S. 1270 (2000), for example, the D.C. Court of Appeals conducted a review "of nexus tests used in other jurisdictions, [and] the criticisms leveled at some of them," and declined to adopt either the "but for" or the "proximate cause" tests, instead choosing to adhere to its "substantial connection" test of relatedness. 746 A.2d at 335. The court then held that the defendant's advertising in the forum satisfied this test (despite the absence of any causal nexus between the advertising and the plaintiff's injury) because such advertising has "a *discernible relationship* to a claim by a District resident who becomes a customer in one of [defendant's] stores and is injured." *Id.* at 335-36 (emphasis added).

Similarly, in *Vons Cos., Inc. v. Seabest Foods, Inc.*, 926 P.2d 1085 (Cal. 1996), *cert. denied*, 522 U.S. 808 (1997), the Supreme Court of California held that specific jurisdiction exists when "there is a substantial nexus or connection between the defendant's forum activities and the plaintiff's claim." *Id.* at 1096, 1102-12. In reaching this conclusion, the California court expressly analyzed and "rejected the proximate cause test as too narrow, and the 'but for' test as too broad and amorphous." *Id.* at 1112; *see also id.* at 1102-09. *See also CompuServe, Inc. v. Patterson*, 89 F.3d 1257, 1267 (6th Cir. 1996) (holding that specific jurisdiction requires only that defendant's contacts are "related to the operative facts of the legal controversy").

B. The Decision Below Dispenses With Any Causal Nexus Or Relationship Between The Cause Of Action And The Defendant's Forum Activities

The decision below appears to create yet a fourth category of tests for personal jurisdiction (or alternatively to expand the concept of "substantial connection" beyond any meaningful limits), because the Supreme Court of Alabama upheld the assertion of personal jurisdiction over petitioners without requiring *any* showing whatsoever of a causal or other nexus between petitioners' Alabama contacts and respondent's cause of action. Instead, the Supreme Court of Alabama virtually dispensed with the "relatedness" prong altogether, focusing its analysis on the separate question whether petitioners' actions were "purposefully directed toward the forum State." App., *infra*, 14a (citation omitted).

Concerning Shingleton, the Court rested its decision on the fact that he had visited Alabama on four occasions in his capacity as an officer or employee of Snap; the court was untroubled by the undisputed fact that none of those visits related to the claims asserted in respondent's complaint. *Id.* at 15a-16a. With respect to McInnis, the court predicated its jurisdictional holding on his *one* visit to Alabama, even though that trip was unrelated to the product at issue (and had nothing whatsoever to do with the cause of action in this

case). In the court's view, the "trip was still an act of the defendant purposefully directed toward the forum State with an intent or purpose to serve the market in the forum State." *Id.* at 17a (citation omitted). In addition, the court pointed to the allegedly culpable mental states of McInnis and Shingleton, *id.* at 16a, 17a, but those allegations likewise do not establish any relationship between petitioners' forum contacts and respondent's cause of action.

Thus, in direct conflict with the "but for" and "proximate cause" cases discussed above, the Supreme Court of Alabama upheld the exercise of personal jurisdiction over petitioners despite the absence of *any* causal nexus between the defendants' contacts with Alabama and the plaintiff's cause of action. Instead, the court held that an individual corporate employee's fortuitous and unrelated forum contacts on behalf of his corporate employer, together with some degree of alleged culpability, automatically suffice to establish the minimum contacts required by due process. The majority reached this conclusion even though the dissenting opinion argued persuasively that specific jurisdiction was unfounded because "the decedent's death did not arise from, or represent a clear, firm nexus" to McInnis's contacts with the forum. App., *infra*, 24a.

The decision below represents a new benchmark in a remarkable shift away from the minimum contacts framework set forth in this Court's precedents and employed by most federal and state appellate courts. In finding that specific jurisdiction existed despite the obvious absence of any meaningful relationship between petitioners' forum contacts and respondent's claim, the decision below effectively eliminates the "relatedness" requirement altogether, stretching the already lax "substantial relationship" test past the breaking point. There can be no question but that a different result would have been reached in this case had the court below applied the "but for" or "proximate cause" tests employed in other jurisdictions. Indeed, even a strict interpretation of the "substantial relationship" test would have required dismissal of the claims against petitioners; only the most attenuated

"relatedness" analysis (akin to that adopted by the D.C. Court of Appeals in the *Shoppers Food Warehouse* case) could justify the result reached below. Review of the decision below is therefore essential in order to establish the proper legal test for determining whether a defendant's forum contacts are sufficiently related to the plaintiff's claims to support the exercise of specific personal jurisdiction.[5]

II. The Alabama Court's Reliance On "Stream Of Commerce" And "Reprehensibility" Factors Conflicts With Decisions Of This And Other Courts

A. The Decision Below Improperly Attributes The "Stream Of Commerce" Contacts Of A Corporation To Individual Officers And Shareholders

The Alabama Supreme Court relied on the "stream of commerce" doctrine enunciated in *World-Wide* and *Asahi* in an attempt to justify the assertion of personal jurisdiction over petitioners. App., *infra*, 13a. The supreme court noted that under *Asahi*, "minimum contacts" are present if the corporation injected a product into the stream of commerce and purposefully directed its conduct at the forum state, so as to indicate an intent or purpose to serve the market in the forum state. *Id.* at 13a-14a. The court below then asked whether "the contacts of [petitioners] pass the test of *Asahi*, for sufficiency to support the exercise of personal jurisdiction over them by the Alabama courts?" *Id.* at 14a-15a.

As the pleadings and decision in this case make clear, "the product at issue in this suit was marketed throughout the United States, including the state of Alabama," by various

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[5] Petitioners note that this issue is also discussed in the petition for a writ of certiorari in *DaimlerChrysler Aktiengesellschaft v. Olson*, No. 01-929 (at pp. 28-30), although that petition is addressed primarily to the issue of "general" jurisdiction. On February 14, 2002, this Court called for a response in that case.

corporate entities, including petitioners' corporate employer and co-defendant Snap. App., *infra*, 6a (quotation marks omitted). Indeed, respondent's amended complaint expressly alleges that "[a]t all times relevant hereto, defendants Pandora Manufacturing, Inc., formerly known as Snap Products, Inc.; Snap Products, Inc.; Snap Automotive Products, Inc.; Pennzoil – Quaker State Company; and Nationwide Industries, Inc. were engaged in the business of manufacturing and marketing an aerosol tire inflator product ('fix a flat') throughout the United States, including the state of Alabama." App., *infra*, 29a ¶ 11. To be sure, petitioners are alleged to have been involved in their capacity as corporate officers or employees in some aspect of the formulation, manufacture, labeling, packaging, sale, supply, "*and/or*" distribution of the Fix-a-Flat product,[6] but it is clear that the *corporate* defendants are the only entities that allegedly engaged in all steps necessary to place the Fix-a-Flat product into the stream of commerce.

Notwithstanding this fact, the Supreme Court of Alabama held that the "stream of commerce" doctrine was applicable to petitioners, thereby attributing to petitioners the *corporate* activities of their corporate employers for purposes of the personal jurisdiction inquiry. This approach is irreconcilable with this Court's precedents, and also conflicts with decisions of other appellate courts.

In the first place, the Alabama Supreme Court's attempt to attribute the forum-related conduct of the corporate defendants to petitioners for purposes of personal jurisdiction is inconsistent with this Court's decisions in *Calder v. Jones*, 465 U.S. 783 (1984), and *Keeton v. Hustler Magazine, Inc.*, 465 U.S. 770 (1984), which hold that jurisdiction over a corporate employee "does not automatically follow from juris-

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[6] Respondent's amended complaint alleges that all of the named defendants "formulated, manufactured, labeled, packaged, sold, supplied *and/or* distributed" the Fix-a-Flat product. App., *infra*, 30a-31a ¶¶ 75-76 (emphasis added); *see also id.* at 31a-35a ¶¶ 81, 83.

diction over the corporation which employs him." *Keeton*, 465 U.S. at 781 n.13 (discussing *Calder*). Under *Calder* and *Keeton*, the law is clear that jurisdiction must be based on petitioners' *own contacts* with the forum; "their contacts with [the forum state] are not to be judged according to their employers' activities there." *Calder*, 465 U.S. at 790; *see also Keeton*, 465 U.S. at 781 n.13. "Each defendant's contacts with the forum State must be assessed individually" (*id.*), and the minimum contacts requirement must be separately "met as to each defendant over whom a court exercises personal jurisdiction." *Calder*, 465 U.S. at 790.

The decision below also conflicts with decisions of other appellate courts that expressly reject the type of attribution approved by the Alabama Supreme Court. In *Stuart v. Spademan*, 772 F.2d 1185 (5th Cir. 1985), for example, the plaintiffs sought to establish personal jurisdiction by attributing the forum contacts of a corporation ("SRS") to the individual defendant, Spademan, who was the corporation's president. According to the plaintiffs, the corporation's contacts with the forum, including its distribution and marketing of the product at issue, "should have been attributed to Spademan and considered along with the other purported contacts in the minimum-contacts analysis." *Id.* at 1196. The Fifth Circuit rejected plaintiffs' argument as "ill founded." *Id.* The court explained that "the general rule is that jurisdiction over an individual cannot be predicated upon jurisdiction over a corporation . . . ." *Id.* at 1197. Because "the plaintiffs have not demonstrated that SRS is but a façade for Spademan's interests and activities to justify attributing SRS's contacts with Texas to Spademan for jurisdictional purposes," the Fifth Circuit concluded that personal jurisdiction over Spademan had not been established. *Id.* at 1198; *see also Gundle Lining Constr. Corp. v. Adams County Asphalt, Inc.*, 85 F.3d 201, 204, 209 (5th Cir. 1996) (rejecting argument that forum contacts of corporate defendant were attributable to the individual owner/officer).

The Fourth Circuit follows a similar approach. In *Helga v. Bonney*, No. 96-1664, 1997 U.S. App. LEXIS 18179 (4th

Cir. July 21, 1997) (unpublished),[7] the court of appeals upheld the assertion of personal jurisdiction over a defendant corporation but held that the Due Process Clause precluded the exercise of personal jurisdiction over the corporation's president and stockholder. *Id.* at *2, *22-23. Although the individual defendant had occasionally visited the forum on behalf of the corporate defendant (*id.* at *6), the court concluded that he did not have sufficient minimum contacts with the forum in his individual capacity and that "any allegedly injurious acts that he committed occurred outside of [the forum]." *Id.* at *22. *See also Columbia Briargate Co. v. First Nat'l Bank In Dallas*, 713 F.2d 1052, 1064-65 (4th Cir. 1983) ("if the claim against the corporate agent rests on nothing more than that he is an officer or employee of the nonresident corporation and if any connection he had with the commission of the tort occurred without the forum state, we agree that, under sound due process principles, the nexus between the corporate agent and the forum state is too tenuous to support jurisdiction over the agent personally").

The law in other jurisdictions is to the same effect.[8] The approach taken by the Alabama Supreme Court is squarely at

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[7] The Fourth Circuit permits citation of unpublished decisions as precedent where "no published opinion . . . would serve as well." 4th Cir. R. 36(c).

[8] *See, e.g., Arkansas Rice Growers Coop. Ass'n v. Alchemy Indus., Inc.*, 797 F.2d 565, 574 (8th Cir. 1986) ("The law is clear that a corporate officer or agent who has contact with the forum state only with regard to the performance of corporate duties does not thereby become subject to jurisdiction in his or her individual capacity."); *Cruz v. Ortho Pharm. Corp.*, 619 F.2d 902, 906 (1st Cir. 1980) ("The general rule is that jurisdiction over the individual officers of a corporation may not be based merely on jurisdiction over the corporation."); *Lehigh Valley Indus., Inc. v. Birenbaum*, 389 F. Supp. 798, 803-04 (S.D.N.Y.), *aff'd*, 527 F.2d 87 (2d Cir. 1975) ("It is axiomatic that jurisdiction over an individual cannot be predicated upon jurisdiction over a corporation. That is to say, an individual's transaction of business within the state solely as an officer of a corporation does not create personal jurisdiction over that individual."); *Ruger v. Superior Court*, 118 Cal. App. 3d 427, 433 (Cal. App. 1981)

[Footnote continued on next page]

odds with this line of authority, because the decision below rests ultimately on the flawed premise that the "stream of commerce" activities of a corporate defendant can be attributed to individual corporate officer/shareholders for jurisdictional purposes.

To be sure, it may be appropriate in certain limited circumstances to treat a corporation as the mere alter ego of an individual defendant, so that due process would not be offended by attributing the corporation's contacts to the individual defendant. *See, e.g., Spademan*, 772 F.2d at 1197. But the law is clear that this exception is applicable only if the plaintiff can establish the traditional veil-piercing factors such as under capitalization, disregard of corporate form and co-mingling of funds. *See, e.g., Gundle Lining Constr. Corp.*, 85 F.3d at 208-09; *Lakota Girl Scout Council, Inc. v. Harvey Fundraising Mgmt., Inc.*, 519 F.2d 634, 638 (8th Cir. 1975).[9]

There is no allegation or evidence in this case that would justify any attempt to treat Snap as the "alter ego" of petitioners, and the Supreme Court of Alabama did not purport to rely on that theory, nor could it have done so. Instead, the court below merely attributed Snap's corporate "stream of

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("For personal jurisdiction to lie, the character, quality and nature of [the defendant corporate officer/shareholder's] activity must bear a substantial relationship to the causes of action beyond that derived solely from his official position with the corporation.").

[9] An analogous situation arises where the plaintiff seeks to establish personal jurisdiction by attributing to a non-resident parent corporation the forum activities of its corporate subsidiary. Here too, courts have consistently rejected the attempt to attribute forum contacts, absent a clear showing that the corporations failed to observe and respect the corporate form. *See, e.g., Consolidated Dev. Corp. v. Sherritt, Inc.*, 216 F.3d 1286, 1293 (11th Cir. 2000) ("[i]t is well established that as long as a parent and a subsidiary are separate and distinct corporate entities, the presence of one in a forum state may not be attributed to the other"); *see also Alpine View Co. v. Atlas Copco AB*, 205 F.3d 208, 218-19 (5th Cir. 2000) (applying "alter-ego" factors to determine that attribution of corporate subsidiary's forum contacts to its corporate parent was unwarranted).

commerce" contacts to petitioners without any justification other than petitioners' status as officers of the corporate defendant and shareholders of its corporate parent. The decision below is thus irreconcilable with the long line of cases rejecting attribution in the personal jurisdiction context.

The Alabama Supreme Court's reliance on the "stream of commerce" doctrine in this case also conflicts with decisions of other courts defining the scope of that doctrine. In *World-Wide Volkswagen Corp. v. Woodson*, this Court held that "[t]he forum State does not exceed its powers under the Due Process Clause if it asserts personal jurisdiction over a *corporation* that delivers its products into the stream of commerce with the expectation that they will be purchased by consumers in the forum State." 444 U.S. at 297-98 (emphasis added); *accord Burger King*, 471 U.S. at 473. Thus, the "stream of commerce" doctrine as recognized by this Court has been limited to assertions of jurisdiction over the *corporate* defendant that actually placed its products into the stream of commerce, and provides no basis for an assertion of jurisdiction over individual officers, employees, or shareholders of the corporation.

Lower courts have specifically rejected efforts to apply "stream of commerce" principles to justify assertions of personal jurisdiction over individual corporate officers. In *Ruger v. Superior Court*, for example, the plaintiff brought suit in California against the nonresident president and shareholder of a corporation that had manufactured and distributed an allegedly defective revolver. The trial court held that the individual defendant was amenable to personal jurisdiction in California because he was a "designer" of the revolver, reasoning that he "was the person who sent his product design 'into the stream of commerce knowing or having reason to know' it would reach California." 118 Cal. App. 3d at 432. The California Court of Appeal reversed. The court explained that, even if the corporate president "was the actual designer of the product in question," the trial court's assertion of jurisdiction under the stream of commerce doctrine "overreaches constitutional limits" because "[a]ll of [the cor-

porate president's] acts outside California with respect to the allegedly defective revolver were on behalf of the corporation and not in his individual capacity. It was the corporation, not [the corporate president] individually, which in fact introduced the revolver as well as its design into the stream of commerce." 118 Cal. App. 3d at 432-33.[10]

Thus, the decision below reflects an unwarranted extension of the "stream of commerce" doctrine and an improper use of attribution principles to justify the assertion of personal jurisdiction over petitioners. Review by this Court is necessary to address the conflict between the decision below and the numerous authorities cited above, and to make clear that personal jurisdiction over corporate shareholders or employees must be assessed solely on the basis of each separate defendant's forum-related activities.

B. The Decision Below Erroneously Creates A "Reprehensibility" Exception To The "Minimum Contacts" Requirement

The decision below also warrants review because it improperly displaces this Court's "minimum contacts" framework with a new test based on a subjective assessment of the reprehensibility of a defendant's alleged conduct. In the specific jurisdiction context, this Court has held that the "fair warning" required by due process is satisfied only when a defendant has "purposefully directed his activities at residents of the forum and the litigation results from alleged injuries that 'arise out of or relate to' those activities." *Burger King*, 471 U.S. at 472 (quotation marks omitted). In stark contrast to that statement of the "minimum contacts" test, the court below held that the "reprehensibility" of the defendants' al-

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[10] *Accord, e.g., Blaschka-Mansfeldt v. Vitek, Inc.*, No. C2-89-1114, 1989 WL 131525 (Minn. App. Nov. 7, 1989) (unpublished) (although corporate defendant's act of manufacturing product and placing it into stream of commerce may establish personal jurisdiction over the corporation, stream of commerce argument was insufficient to establish jurisdiction over individual corporate officer who had developed the product).

leged acts could make up for what would otherwise be an *absence* of the requisite minimum contacts: "*The reprehensible extent of McInnis's culpability . . . increases the importance of McInnis's contacts with Alabama enough that* [the requirements of due process are satisfied]." App., *infra*, 17a (emphasis added). As the dissent cogently recognized, "[t]he majority opinion improperly displaces the long-standing constitutional requirement of 'minimum contacts' with a new, sliding scale based upon subjective views of the reprehensibility of the defendant's alleged conduct." *Id.* at 22a.

The Alabama court's holding that the subjective reprehensibility of a defendant's alleged conduct can enhance the constitutional significance of otherwise insufficient contacts is directly contrary to this Court's precedents. As this Court has made clear, "minimum contacts" are indeed the irreducible constitutional minimum, and the only factors relevant to the "minimum contacts" inquiry are whether (1) the nonresident defendant "'purposefully directed his activities at residents of the forum," and (2) "the litigation results from alleged injuries that 'arise out of or relate to' those activities" (*Burger King*, 471 U.S. at 472 (citations omitted))—factors that decidedly do *not* include the perceived "reprehensibility" of the defendant's alleged acts.

Moreover, even assuming *arguendo* that an examination of "reprehensibility" might be permissible as part of the third prong of the due process test, which asks whether the exercise of jurisdiction would be consistent with "fair play and substantial justice" (*Burger King*, 471 U.S. at 476), the approach followed by the court below would still be indefensible. Numerous appellate courts have held that the "fair play and substantial justice" inquiry is irrelevant unless and until the court first concludes "that a defendant purposefully established minimum contacts within the forum State . . . ." *Id.* As the Second Circuit held in *Metropolitan Life Insurance Co. v. Robertson-Ceco Corp.*, 84 F.3d 560 (2d Cir. 1996), "[a] reviewing court must *first* examine the defendant's contacts with the forum [and] [i]f the same do not exist in sufficient abundance, that is, if the constitutionally necessary

first-tier minimum is lacking, *the inquiry ends*." *Id.* at 568 (quotations and citations omitted; emphasis added).[11] At best, the Alabama Supreme Court's contrary reasoning reflects a distinctly minority view. *Cf. Prejean*, 652 F.2d at 1269 (forum's interest in adjudicating dispute "can serve to enhance the contacts with the forum to a quality that justifies the assertion of jurisdiction").

The conflict between the ruling below and the decisions of this and other courts on this issue provides ample justification for this Court's review. Petitioners respectfully submit that certiorari should be granted so that this Court can make clear that, as the dissent below observed, "*in personam* jurisdiction turns on the level of contacts, not the severity of [alleged] wrongdoing." App., *infra*, 25a.

C. The Decision Below Improperly Collapses The Distinction Between Specific And General Jurisdiction

Finally, review by this Court is also necessary because the decision below effectively collapses the distinction between general and specific jurisdiction by eviscerating this Court's relatedness requirement. The relatedness inquiry guarantees a non-resident defendant the fundamental fairness required by due process by prohibiting the exercise of personal jurisdiction in those cases not "arising out of or relating to" the defendant's forum activities, unless the defendant has

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[11] *Accord, e.g., Vetrotex Certainteed Corp. v. Consolidated Fiber Glass Prods. Co.*, 75 F.3d 147, 150-51 (3d Cir. 1996) ("*if* 'minimum contacts' are shown, jurisdiction may be exercised where . . . to do so would comport with 'traditional notions of fair play and substantial justice'") (emphasis added); *Felch v. Transportes Lar-Mex SA DE CV*, 92 F.3d 320, 329 (5th Cir. 1996) ("[a]s Felch failed to establish sufficient 'minimum contacts' with Texas, we need not address whether the exercise of personal jurisdiction in this case would offend traditional notions of fair play and substantial justice"); *Omeluk v. Langsten Slip & Batbyggeri A/S*, 52 F.3d 267, 270-71 (9th Cir. 1995) ("[w]e do not discuss the 'reasonableness' criterion, because . . . it is plain that the first two criteria are not satisfied").

the type of "continuous and systematic" contacts required for the exercise of general jurisdiction. *Helicopteros,* 466 U.S. at 414 nn.8-9; *see also Swiss Am. Bank, Ltd.*, 274 F.3d at 623 ("[t]he relatedness inquiry separates general jurisdiction from specific jurisdiction cases"); *Shute*, 897 F.2d at 385 (describing "the basic function of the 'arising out of' requirement" as "preserv[ing] the essential distinction between general and specific jurisdiction").

The decision below essentially combines the relatedness requirement and the purposeful availment requirement of *Burger King* into a single inquiry, but as other courts have correctly recognized, "the inquiries are different." *Swiss Am. Bank*, 274 F.3d at 623. The relatedness prong "ensures fundamental fairness by protecting a defendant from being hauled into an out-of-state forum based on a single contact that is wholly unrelated to the suit at issue," *id.*, whereas the purposeful availment prong protects non-resident defendants in those instances where a cause of action arises from or relates to an otherwise random or fortuitous contact which could not reasonably provide "fair warning" that such activity might "subject them to the jurisdiction of a foreign sovereign." *Burger King*, 471 U.S. at 472, quoting *Shaffer v. Heitner*, 433 U.S. 186, 218 (1977).

Satisfied that petitioners' contacts evidenced purposeful availment of the forum State and therefore "pass[ed] the test of *Asahi*," the court below upheld jurisdiction over petitioners despite the absence of a causal nexus (or indeed any relationship) between petitioners' forum contacts and respondent's cause of action. If the rule of law put forward by the court below carries the day, individuals and corporations will be subjected to the jurisdiction of distant and disparate forums on a showing of as little as a single act purposefully directed at the forum state, even if that act has no relationship to the cause of action. Such a result clearly contravenes the settled principles governing personal jurisdiction enunciated by this Court. Review should be granted to preserve the due process protections that properly constrain the exercise of personal jurisdiction.

III. The Questions Presented Are Of Recurring And Substantial Importance

As the foregoing discussion demonstrates, the question of relatedness arises with considerable frequency, and is of central importance to the personal jurisdiction inquiry. The exercise of specific jurisdiction is appropriate only where a prospective litigant has "fair warning" that certain conduct may subject him or her to suit in a particular forum, and it is the relatedness inquiry that serves this essential function. *Burger King*, 471 U.S. at 472. Given its profound importance to the due process framework, application of the relatedness inquiry should be clear and consistent. *See World-Wide*, 444 U.S. at 297 (due process inquiry should "give[] a degree of predictability to the legal system that allows potential defendants to structure their primary conduct with some minimum assurance as to where conduct will and will not render them liable to suit"). Unfortunately, the conflicts in approaches among the lower state and federal courts have led to the opposite result, as the decision below amply demonstrates.

This Court has already recognized the importance of establishing the proper legal test for relatedness in specific jurisdiction cases. Indeed, more than a decade has passed since this Court granted review in *Carnival Cruise Lines* on the same question presented in this petition. Since that time, the conflict over the relatedness requirement has only intensified, as some courts have dispensed altogether with tests based on causality, instead favoring an even less defined notion of relatedness based on a mere "discernible relationship" between a defendant's contacts and the plaintiff's claim. This troubling result concerning a fundamental liberty interest is of great importance and compels review by this Court.

If allowed to stand, the decision below will exacerbate the existing conflicts that divide the lower courts and compound the arbitrariness and unfairness produced by the lack of clarity and certainty in this important area of the law. The Supreme Court of Alabama's decision to engraft a subjective "reprehensibility" inquiry onto the "minimum contacts" test,

its attribution of corporate contacts to individual corporate officers and shareholders, and its evisceration of the "relatedness" prong are the latest, and most extreme, examples of the widening division of authority in this area. The necessity for this Court's review is stark and apparent, and this case provides an excellent vehicle for the Court's consideration of the full range of issues raised by the existing conflicts over the proper test for assessing claims of specific jurisdiction.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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March 4, 2002

APPENDIX

APPENDIX A

NOTICE: This opinion is subject to formal revision before publication in the advance sheets of Southern Reporter. Readers are requested to notify the Reporter of Decisions, Alabama Appellate Courts, 300 Dexter Avenue, Montgomery, Alabama 36104-3741 ((334) 242-4621), of any typographical or other errors, in order that corrections may be made before the opinion is printed in Southern Reporter.

SUPREME COURT OF ALABAMA

OCTOBER TERM, 2001-2002

1990045

Ex parte Sam McInnis, Michael Borka, and Tim Shingleton

PETITION FOR WRIT OF MANDAMUS

(Re: Pamela Alice Little Daniel, as administratrix of the estate of Joe Ed Daniel, deceased

v.

Pandora Manufacturing, Inc., et al.)

(Baldwin Circuit Court, CV-98-1113)

1990659

Ex parte Pamela Alice Little Daniel, as administratrix of the estate of Joe Ed Daniel, deceased

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(Re: Pamela Alice Little Daniel, as administratrix of the estate of Joe Ed Daniel, deceased

v.

Pandora Manufacturing, Inc., et al.)

(Baldwin Circuit Court, CV-98-1113)

JOHNSTONE, Justice.

Petitioners-defendants Sam McInnis, Michael Borka, and Tim Shingleton petition this Court for a writ of mandamus to direct the trial judge to vacate her order denying these defendants' Rule 12(b)(2), Ala. R. Civ. P., motions to dismiss for want of personal jurisdiction and to direct her to enter an order granting these motions. We deny mandamus relief to the defendants McInnis and Shingleton but grant mandamus relief to the defendant Borka.

Anticipating the possibility that this Court might grant the writ of mandamus sought by the petitioner-defendants, the plaintiff Pamela Alice Little Daniel has, filed her own petition for a writ of mandamus to direct the trial judge to vacate an order granting these defendants' motions to strike certain evidentiary materials submitted by the plaintiff in opposition to these defendants' Rule 12(b)(2) motions to dismiss. The plaintiff asks that, if 'we grant these defendants relief by directing the trial judge to vacate her order denying these defendants' Rule 12(b)(2) motions, we also direct the trial judge to consider the plaintiff's evidentiary materials in a further consideration of these defendants' Rule 12(b)(2) motions. The plaintiff's petition for a writ of mandamus is moot in part and denied in part.

Pamela Alice Little Daniel, as the administratrix of her husband's estate, sued Sam McInnis, Michael Borka, Tim Shingleton, Snap Products, Inc., Snap Automotive Products, Inc., and other foreign corporations for tortiously formulating, manufacturing, labeling, and distributing a product named "Fix-a-Flat Non-Explosive Formula," which, the

plaintiff alleges, killed her husband Joe Ed Daniel, and for thereby wrongfully causing his death. Each of the defendants McInnis, Borka, and Shingleton, all residents of North Carolina, filed a Rule l2(b)(2), Ala. R. Civ. P., motion to dismiss the claims against him for lack of personal jurisdiction on the ground that he did "not have sufficient or minimal personal contacts to confer personal jurisdiction over him, individually or as an officer of Snap, in the courts of Alabama in this action"; and each of these defendants filed an affidavit in support of his motion to dismiss. Thereafter, the plaintiff filed an amended complaint, and the defendant Shingleton filed a supplemental affidavit. The parties agreed that these three defendants could refrain from answering the plaintiff's complaint as amended until after these defendants' Rule 12(b)(2) motions to dismiss were finally decided.

In hearing and denying these three defendants' Rule 12(b)(2) motions, the trial judge considered only those facts alleged in the plaintiff's complaint and amended complaint and those facts' sworn in the four affidavits filed by the defendants. The trial judge refused to consider the evidentiary materials submitted by the plaintiff.

In considering a Rule 12(b)(2), Ala. R. Civ. P., motion to dismiss for want of personal jurisdiction, a court must consider as true the allegations of the plaintiff's complaint not controverted by the defendant's affidavits, *Robinson v. Giamarco & Bill, P.C.*, 74 F.3d 253 (11th Cir. 1996), and *Cable/Home Communication Corp. v. Network Productions, Inc.*, 902 F. 2d 829 (11th Cir. 1990), and "where the plaintiff's complaint and the defendant's affidavits conflict, the court must construe all reasonable inferences in favor of the plaintiff." *Robinson*, 74 F.3d at 255 (quoting *Madara v. Hall*, 916 F.2d 1510, 1514 (11th Cir. 1990). "For purposes of this appeal [on the issue of *in personam* jurisdiction] the facts as alleged by the . . . plaintiff will be considered in a light most favorable to him [or her]." *Duke v. Young*, 496 So. 2d 37, 38 (Ala. 1986).

A denial of a Rule 12(b)(2) motion to dismiss for want of personal jurisdiction is interlocutory and preliminary only.

After such a denial, the continuation of personal jurisdiction over a defendant who appropriately persists in challenging it in the defendant's answer to the complaint and by motion for summary judgment or at trial depends on the introduction of substantial evidence to prove the plaintiff's jurisdictional allegations, in the plaintiff's complaint. *Hunt v. BP Exploration Co. (Libya) Ltd.*, 492 F. Supp. 885, 895 (N.D. Tex. 1980); *Speir v. Robert C. Herd & Co.*, 189 F. Supp. 436 (D. Md. 1960); Champ Lyons, Jr., *Alabama Rules of Civil Procedure Annotated* § 12.3 (3d ed. 1996); and Wright and Miller, *Federal Practice and Procedure: Civil* § 1351 at 568 (1969). *See also Ex parte Sekeres*, 646 So. 2d 640, 642 (Ala. 1994) (Houston, J., concurring specially).

A writ of mandamus is an extraordinary remedy which requires a showing of (a) a clear legal right in the petitioner to the order sought, (b) an imperative duty on the respondent to perform, accompanied by a refusal to do so, (c) the lack of another adequate remedy, and (d) the properly invoked jurisdiction of the court. *Ex parte Bruner*, 749 So. 2d 437, 439 (Ala. 1999). "Because the order of the trial court was interlocutory, a writ of mandamus is an appropriate remedy for the petitioners in this case." *Ex parte Paul Maclean Land Servs., Inc.*, 613 So. 2d 1284, 1286 (Ala. 1993).

"A corporate agent who personally participates, albeit in his or her capacity as such agent, in a tort is personally liable for the tort." *Sieber v. Campbell*, [Ms. 1991706, July 13, 2001] ___ So. 2d ___, ___ (Ala. 2001). *See also Bethel v. Thorn*, 757 So. 2d 1154, 1158 (Ala. 1999), and *Ex parte Charles Bell Pontiac-Buick-Cadillac-GMC*, 496 So. 2d 774, 775 (Ala. 1986). Likewise, corporate agent status does not insulate the agent personally from his or her jurisdictional contacts with a state or from personal jurisdiction in the state. *Calder v. Jones*, 465 U.S. 783, 790 (1984); *Sieber*, *supra*; *Sudduth v. Howard*, 646 So. 2d 664, 668 (Ala. 1994); and *Duke*, 496 So. 2d at 40.

The plaintiff's amended complaint pleads the manner of Mr. Daniel's death and pleads the personal participation of the defendants McInnis, Borka, and Shingleton in the formu-

lation, manufacture, labeling, and distribution of the product which killed Mr. Daniel. These three defendants' own affidavits supply the remaining facts necessary to an analysis of the issue of the personal jurisdiction of the Alabama court over them.

On June 4, 1997, Mr. Daniel was killed by the explosion of Snap Fix-a-Flat Non-Explosive Formula ("the product") inside a motor grader tire mounted on its rim. He had been welding a small lug to the rim when the heat of the welding ignited the product, and the consequent explosion propelled fragments of the tire and components of the rim assembly into him and thereby decapitated him. The tire had previously been inflated with two cans of the product.

At the time the two cans of the product were manufactured, labeled, and distributed, a transferable label system was commonly available, known and used in the tire-inflator industry. Typically, a removable warning label would be affixed to the tire-inflator can with instructions to peel the label off the can and to transfer the label to whatever tire was inflated with the contents of the can. The product which killed Mr. Daniel was not manufactured or distributed with any such label, and consequently the tire which exploded had not been labeled with such a warning, even though the propellant contained in the product was explosive *dimethyl ether ("DME")*, known at the time to have caused injuries and deaths like Mr. Daniel's. (The name of the propellant dimethyl ether bears remembering because its explosive nature is important to the rationale of this case.) Rather, the cans used to inflate the tire involved in Mr. Daniel's death were marked "Fix-a-Flat NON-EXPLOSIVE FORMULA." (Capitalization in original.) The pleadings allege that "Mr. Daniel, and the individuals who previously purchased and injected the 'fix a flat NON-EXPLOSIVE FORMULA' tire inflator product into the subject motor grader tire, were disarmed by the product's labeling into believing the motor grader tire did not have to be removed from the rim before the tacking procedure was performed."

The pleadings allege that, "[p]rior to June 4, 1997," McInnis, Borka, and Shingleton (among other defendants) "formulated, manufactured, labeled, packaged, sold, supplied and/or distributed the 'fix a flat NON-EXPLOSIVE FORMULA' tire inflator/sealant involved in the accident made the basis of this suit." The ostensible corporate source of the product was Snap Products, Inc. The product was marketed "throughout the United States, including the state of Alabama." In April 1995, over two years before Mr. Daniel's death, the defendants McInnis, Borka, and Shingleton formed Snap *Automotive* Products, Inc., and purchased Snap Products, Inc., from its then owners, the "Bishop Estate" in Hawaii. "Defendant Snap Automotive Products, Inc. is a Delaware corporation with its principal residence located in North Carolina."

> "57. At the time defendants McInnis, Borka, and Shingleton formed Snap Automotive Products, Inc., and bought Snap Products, Inc. from the 'Bishop Estate,' these defendants knew the *DME [(dimethyl ether)]* 'fix a flat' product was explosive and they had no intention to recall, or relabel, the product regarding flammability/explosivity risks."

(Amended complaint, emphasis added.) Between the time McInnis, Borka, and Shingleton formed Snap Automotive Products, Inc., to buy Snap Products, Inc., and the time the product killed Mr. Daniel, these three defendants learned of three intervening explosions of the product that injured three other men the same way Mr. Daniel would be killed. Notwithstanding this knowledge, McInnis, Borka, and Shingleton still chose not to recall or to relabel the product.

The pleadings detail extensive facts of the *defendant McInnis's* personal knowledge, attitude, and acts in the formulation, manufacture, labeling, and distribution of the product. For some five years before he, Borka, and Shingleton formed Snap Automotive Products, Inc., and bought Snap Products, Inc., McInnis had participated in the evolution of tire inflators in affiliation with Snap Products, Inc., and an-

other defendant, Nationwide Industries, Inc. For Nationwide, McInnis had marketed a tire inflator containing hydrochlorofluorocarbon ("HCFC"), a truly nonexplosive propellant that replaced a previously used propane/butane propellant, which had proved explosive. While McInnis was marketing the tire inflator containing nonexplosive HCFC, he criticized a competitor for endangering the public by using *explosive DME* as a propellant. Yet when the federal government prohibited the use of HCFC because it depleted the ozone layer of the atmosphere of the earth, *McInnis promoted and marketed a change to the DME propellant he already knew to be explosive.* In deciding to change to the explosive DME, McInnis rejected still another alternative, a nonexplosive propellant called 134A, as too expensive. At the time McInnis promoted the change from the nonexplosive but ozone-depleting HCFC to the *explosive DME*, the competitor had recalled its *DME* tire inflator *because of its explosion hazard. Yet McInnis rejected the use of transferable warning labels on the explosive DME product he was marketing, and marketed the DME product as nonexplosive, because he knew it would sell better that way.*

During the evolution of the product, *McInnis* ordered and received *tests* which proved that DME *posed an explosion hazard.* He also learned of tests to the same effect obtained by others. In March 1994 *McInnis acknowledged*, in the words of the pleadings, "*that the DME 'fix a flat' product was, in fact, explosive* and may have to be recalled, which would cost millions of dollars, *could cost Mr. McInnis his job*, or could put Snap out of business." (Emphasis added.) In March and April 1994, responding to criticisms that the Snap Fix-a-Flat NON-EXPLOSIVE FORMULA posed an explosion hazard, McInnis defended his marketing of the product by explaining that Snap carried $25,000,000 in liability insurance, which would cover any losses.

The scenarios for the welding explosion injuries from tire inflators containing explosive propellants were essentially the same. A mechanic or other consumer, unaware of the explosion hazard, would perform some. welding on a rim

without removing from the rim a tire inflated with the inflator including the explosive propellant; the heat from the welding would ignite the propellant; and the consequent explosion, or tire and rim parts driven by it, would injure the user. Such explosion injuries occurred both before and after McInnis, Borka, Shingleton formed Snap Automotive Products, Inc., to buy Snap Products, Inc. Yet *McInnis, with knowledge of these explosion injuries, steadfastly rejected the transferable warning labels and marketed the explosive DME product as nonexplosive and safe in his affiliations with Nationwide, Snap Products, Inc., and Snap Automotive Products, Inc.*

While the affidavits filed by McInnis and Shingleton deny certain kinds of contacts with the state of Alabama, the affidavits of Shingleton and McInnis do reveal and admit certain other contacts. Paragraph 5 of *Shingleton's first affidavit* reads:

> "5. *On four occasions* between 1992 to [sic] early 1995, *I traveled to Alabama* on the business of Snap. Sometime between 1992 and 1994, I traveled twice on behalf of Snap to Tuscaloosa, Alabama, to visit a potential customer, Carport. Besides my travel time, I spent approximately one hour per visit. *Carport eventually purchased some of Snap's product line, but not the Fix-a-Flat product.* In the [sic] late 1994 or early 1995, I traveled to Birmingham, Alabama, to visit a potential customer, Big B Drugs. My meeting with Big B Drugs lasted approximately one hour. Finally, some time prior to 1995, I traveled to the Mobile, Alabama, area and visited with a manufacturer's representative to several local warehouse distributors. My visits with these distributors would have amounted to a total of less than four hours of time."

Paragraphs 2 and 3 of *Shingleton's second affidavit* read:

"2. In my prior affidavit in this case, I referenced four isolated visits to Alabama. My short trip to Birmingham was to Big B Drugs. This visit focused on *Snap Products' entire seventy plus products line, not specifically* Fix-A-Flat, and did not *directly* result in an order for Fix-A-Flat. My one-day trip to the Mobile area was to several small distributors/retailers again relating to *Snap Products' entire product line*, not specifically to the Fix-A-Flat product.

"3. None of my four trips to Alabama dealt with the manufacture, labeling, testing, or formulation of Fix-A-Flat and none of the brief trips resulted *directly* in the sale of Fix-A-Flat. In fact, I did not have any involvement in the formulation, testing or the labeling of Fix-A-Flat during the 1993 and 1994 period when the third generation formula was developed." (Emphasis added.)

Paragraph 5 of *McInnis's affidavit* reads:

"5. In 1994 or 1995, I traveled on behalf of Snap to Tuscaloosa, Alabama, to visit *an existing customer, Carport.* At that time, *Carport already purchased one or two Snap products but not the Fix-A-Flat product* at issue in this lawsuit. The intent of my visit was to convince Carport to enter into a blanket purchase arrangement whereby Carport would carry *Snap's entire entry-level line of products. The entry-level line did not include Fix-A-Flat* product at issue in this lawsuit. My visit was unsuccessful, as Carport declined to enter into any such arrangement, and Carport purchased no *new* Snap products as a result of my visit." (Emphasis added.)

Paragraphs 3, 4, and 5 of Borka's affidavit read:

> "3. I am a North Carolina resident, and have lived in North Carolina with my family since 1993. I have never lived in Alabama or been a resident of Alabama.
>
> "4. *I have never been to the state of Alabama on either personal or business matters.* I do not now have nor have I ever had any contact with or interest in the state of Alabama, whether personal or business-related.
>
> "5. I have never owned property or real estate in Alabama. I have never been a litigant in the courts of Alabama or availed myself of the courts of Alabama. I have never received any benefits of any kind from the State of Alabama."

The affidavits of these three defendants also reveal their respective offices with Snap Products, Inc. From September 1993 to March 1995, *McInnis* was "Vice-President of Sales"; and, from April 1995 to November 1997, he was "Chief Executive Officer." From April 1995 to November 1997, *Borka* was "Chief Financial Officer." From September 1993 to March 1995, *Shingleton* was "a Regional Sales Manager or Vice-President of Sales"; and, from April 1995 to November 1997, Shingleton was "President of Operations." The plaintiff's pleadings allege that *the product which killed Mr. Daniel produced approximately half of the income of Snap Products, Inc.*, more income than any of its other products produced.

Rule 4.2, Ala. R. Civ. P., extends the personal jurisdiction of Alabama courts to the limit of due process under the federal and state constitutions. *Sieber*, *supra*. *See also World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286, 297 (1980); *Duke*, *supra*; *Brooks v. Inlow*, 453 So. 2d 349 (Ala. 1984); and *Alabama Waterproofing Co. v. Hanby*, 431 So. 2d 141, 144-146 (Ala. 1983). "A physical presence in Alabama is not a prerequisite to personal jurisdiction over a

nonresident." Sieber, ___ So. 2d at ___. *See also Sudduth*, 646 So. 2d at 667.

> """What is required is that the out-of-state resident have 'some minimum contacts with this state [so that], under the circumstances, *it is fair and reasonable to require the person to come to this state to defend an action.*' Rule 4.2(a)(2)(I), Ala. R. Civ. P. [(Emphasis added.)]
>
> """"[D]ue process requires only that in order to subject a defendant to a judgment *in personam*, if he be not present within the territory of the forum, he have certain minimum contacts with it such that the maintenance of the suit does not offend 'traditional notions of fair play and substantial justice.'""" *McGee v. International Life Ins. Co.*, 355 U.S. 220, 78 S.Ct. 199, 2 L.Ed.2d 223 (1957), quoting *International Shoe Co. v. Washington*, 326 U.S. 310, 316, 66 S.Ct. 154, 158, 90 L.Ed. 95 (1945). Alabama's long-arm statute (Rule 4.2, Ala. R. Civ. P.) has been interpreted by this Court to extend the jurisdiction of Alabama courts to the permissible limits of due process. *DeSotacho, Inc. v. Valnit Industries, Inc.*, 350 So. 2d 447 (Ala. 1977), *Duke v. Young*, 496 So. 2d 37 (Ala. 1986)
>
> """*Alabama's long-arm procedure for service of process is not limited to 'rigid transactional categories' or subject to a mechanical formula. Alabama Waterproofing Co. v. Hanby*, 431 So. 2d 141 (Ala. 1983). Instead, the relevant facts and attendant circumstances must be examined and the relationship among the defendant, the forum, and the litigation analyzed to determine if the defendant has sufficient 'minimum contacts' so that 'the maintenance of the suit does not offend "tradi-

> tional notions of fair play and substantial justice.'" *International Shoe Co. v. Washington.*" [(Emphasis added.)]

"'A relevant factor in a due process analysis is *whether the defendant should have reasonably anticipated that he would be sued in the forum state.* [(Emphasis added.)] In *Dillon Equities, supra,* at 462, this Court, quoting *World-Wide Volkswagen Corp. v. Woodson,* 444 U.S. 286, 100 S.Ct. 559, 62 L.Ed.2d 490 (1980) noted:

> """"The foreseeability that is critical to due process analysis . . . is that the defendant's conduct and connection with the forum state are such that *he should reasonably anticipate being haled into court there.*' (Citations omitted.)[(Emphasis added.)]"""

Sudduth, 646 So. 2d at 667 (quoting *Knowles v. Modglin,* 553 So. 2d 563, 565-66 (Ala. 1989)). Rule 4.2(a) provides, in pertinent part:

> "(2) *Sufficient Contacts.* A person has sufficient contacts with the state when that person, acting directly or by agent, is or may be legally responsible as a consequence of that person's
>
> "....
>
> "(D) causing tortious injury or damage in this state by an act or omission outside of this state if the person regularly does or solicits business, or engages in any other persistent course of conduct or derives substantial revenues from goods used or consumed or services rendered in this state;
>
> "....
>
> "(I.) *otherwise having some minimum contacts with this state and, under the circumstances, it is fair and reasonable to require*

> *the person to come to this state to defend an action.* The minimum contacts referred to in this subdivision (I) shall be deemed sufficient, *notwithstanding a failure to satisfy the requirements of subdivisions (A)-(H) of this subsection (2)*, so long as the prosecution of the action against a person in this state is not inconsistent with the constitution of this state or the Constitution of the United States."

(Emphasis added.) In *World-Wide Volkswagen Corp.*, 444 U.S. at 297-98 (1980), the Supreme Court stated that "[t]he forum State does not exceed its powers under the Due Process Clause if it asserts personal jurisdiction over a corporation that delivers its products into the stream of commerce with the expectation that they will be purchased by consumers in the forum State." In *Asahi Metal Industry Co., Ltd. v. Superior Court of California, Solano County*, 480 U.S. 102 (1987), the Supreme Court *clarified the "stream of commerce" doctrine* of personal jurisdiction:

> "Since *World-Wide Volkswagen*, lower courts have been confronted with cases in which the defendant acted by placing a product in the stream of commerce, and the stream of commerce *eventually* swept defendant's product into the forum State, *but the defendant did nothing else to purposefully avail itself of the market in the forum State.* Some Courts have understood the Due Process Clause, as interpreted in *World-Wide Volkswagen*, to allow an exercise of personal jurisdiction to be based on no more than the defendant's act of placing the product in the stream of commerce. Other courts have understood the Due Process Clause and the above-quoted language in *World-Wide Volkswagen* to require *the action of the defendant to be more purposefully directed at the forum State than the mere act of placing a product in the stream of commerce.*

"....

> "*We now find this latter position to be consonant with the requirements of due process.* The 'substantial connection,' [*Burger King Corp. v. Rudzewicz*, 471 U.S. 462, 475 (1985); *McGee v. International Life Ins. Co.*, 355 U.S. 220, 223 (1957)], between the defendant and the forum State necessary for a finding of minimum contacts must come about by *an action of the defendant purposefully directed toward the forum State. Burger King, supra*, 471 U.S., at 476 .... The placement of a product into the stream of commerce, without more, is not *an act of the defendant purposefully directed toward the forum State.* Additional conduct of the defendant may indicate *an intent or purpose to serve the market in the forum* State, for example, designing the product for the market in the forum State, advertising in the forum State, establishing channels for providing regular advice to customers in the forum State, or *marketing the product through a distributor who has agreed to serve as the sales agent in the forum State.* But a defendant's awareness that the stream of commerce may or will sweep the product into the forum State does not convert the mere act of placing the product into the stream into an act purposefully directed toward the forum State."

480 U.S. at 110-12 (some emphasis original; some emphasis added). "Whether sufficient contacts exist so that the maintenance of a suit in Alabama does not offend reasonableness and fair play is to be determined on a case by case basis." *Bryant v. Ceat S.p.A.*, 406 So. 2d 376, 377 (Ala. 1981), *cert. denied*, 456 U.S. 944 (1982)

Do the contacts of the defendants McInnis, Borka, and Shingleton pass the test of *Asahi, supra*, for sufficiency to

support the exercise of personal jurisdiction over them by the Alabama courts? To what extent did they engage in actions "purposefully directed toward the forum State" so as to "indicate an intent or purpose to serve the market in the forum State"? *Asahi*, 480 U.S. at 112.

Do the contacts of these defendants pass the tests of *Sudduth*, *supra*, for sufficiency to support the exercise of personal jurisdiction by the Alabama courts? To what extent is it "fair and reasonable to require [these defendants] to come to this state to defend an action"? *Sudduth*, 646 So. 2d at 667, and Rule 4.2(a)(2)(I). To what extent should these defendants "reasonably [have] anticipate[d] being haled into court" in Alabama? *Sudduth*, 646 So. 2d at 667.

The plaintiff's pleadings expressly allege that each of these defendants, among other defendants, "formulated, manufactured, labeled, packaged, sold, supplied and/or distributed the 'fix a flat NON-EXPLOSIVE FORMULA' tire inflator/sealant involved in the accident made the basis of this suit." The plaintiff's pleadings also allege that each of these defendants knew of the explosiveness of the product, knew of the three actual injuries caused by explosions of the product in 1995 and 1996 before Mr. Daniel's death in 1997, and participated together in the decision not to recall or to relabel the product. The pleadings, however, also reveal a greater degree of culpable participation by McInnis than by Borka or Shingleton. Likewise, uncontroverted portions of these three defendants' respective affidavits establish differences among the three in their respective degrees of physical presence in Alabama. Therefore, even though a "physical presence in Alabama is not a prerequisite to personal jurisdiction over a nonresident," *Sieber*, ___ So. 2d at ___, we will analyze the amenability of each of these defendants to personal jurisdiction in Alabama seriatim, in the order of decreasing degrees of physical presence in Alabama. *See also Sudduth*, 646 So. 2d at 667.

Shingleton visited Alabama four times "between 1992 . . . [and] early 1995" to develop a market here for not only the product which killed Mr. Daniel, but also "Snap Prod-

ucts' entire seventy plus products line." He successfully enlisted Carport as a retailer of "some of Snap's product line, but not the Fix-a-Flat product." Likewise he successfully enlisted Big B Drugs as a retailer for the entire product line, including Fix-a-Flat. He also visited "a manufacturer's representative to several local warehouse distributors" and "several small distributors/retailers again relating to Snap Products' entire product line." While Shingleton's affidavit states that "[n]one of my four trips to Alabama dealt with the manufacture, labeling, testing, 'or formulation of Fix-A-Flat" and that he "did not have any involvement in the formulation, testing or the labeling of Fix-A-Flat during the 1993 and 1994 period when the third generation formula was developed," Shingleton does not dispute the plaintiff's allegations that Shingleton knew of the explosiveness of the Fix-A-Flat product, that he knew of the actual explosions which injured three men other than Mr. Daniel in 1995 and 1996, and that he participated in the decision thereafter not to recall or to relabel the product. Likewise, Shingleton does not dispute the plaintiff's allegation that Shingleton manufactured the product. He simply denies that his trips to Alabama "dealt with" the manufacture and denies that he had "any involvement in the labeling of Fix-A-Flat during the 1993 and 1994 period."

These facts, thus established for the purpose of judging Shingleton's Rule 12(b)(2) motion to dismiss for want of personal jurisdiction, pass the tests of *Asahi* and *Sudduth*, *supra*. Shingleton's actions were "purposefully directed toward the forum State" so as to "indicate an intent or purpose to serve the market in the forum State." *Asahi*, 480 U.S. at 112. "[I]t is fair and reasonable to require [Shingleton] to come to this state to defend [this] action." *Sudduth*, 645 So. 2d at 667, and Rule 4.2(a)(2)(I). And Shingleton "should [have] reasonably anticipate[d] being haled into court" in Alabama. *Id.* Therefore, the trial judge correctly denied Shingleton's motion to dismiss; and Shingleton has not established a right to mandamus relief.

McInnis admits in his affidavit that he traveled to Alabama to convince "an *existing* customer, Carport" (emphasis added), "to carry Snap's entire entry-level line of products," which "did not include Fix-A-Flat." McInnis's claim that this trip was unsuccessful does not eliminate the importance of the trip as a contact between him and Alabama, The trip was still "an act of the defendant purposefully directed toward the forum State" with "an intent or purpose to serve the market in the forum State." *Asahi*, 480 U.S. at 112. Had the trip succeeded, it would have promoted not only the particular products accepted by Carport but also the brand name itself, and the enhancement of the brand name would have promoted the sales of the explosive Snap Fix-A-Flat product being sold by other retailers.

McInnis's affidavit does not deny any of the substantive allegations of the plaintiff's pleadings. McInnis does not deny that he formulated, manufactured, labeled, and distributed the fatal product. He does not deny that he knew and suppressed its explosiveness. He does not deny that he used an explosive propellant instead of a nonexplosive propellant simply to save money. He does not deny that he learned of the three injuries caused by explosions of the product in 1995 and 1996 similar to the explosion which would kill Mr. Daniel in 1997. Finally, McInnis does not deny that, with full knowledge of the explosiveness of the product and the injuries from it, he decided not to recall or to relabel the product.

The reprehensible extent of McInnis's culpability, as established by the pleadings for the limited purpose of deciding his Rule 12(b)(2) motion to dismiss, increases the importance of McInnis's contacts with Alabama enough that "it is fair and reasonable to require [him] to come to this state to defend an action," *Sudduth*, 646 So. 2d at 667, and Rule 4.2(a)(2)(I), and enough that "he should reasonably [have] anticipat[ed] being haled into court" here, *Sudduth*, 645 So. 2d at 667. Therefore, the trial court correctly denied McInnis's motion to dismiss, and McInnis has not established a right to mandamus relief.

Whether the plaintiff can prove her allegations against the defendants McInnis and Shingleton and can thereby maintain personal jurisdiction at the stages of the litigation that require proof as distinguished from pleadings remains to be seen. But Justice Houston's special concurrence in the procedurally analogous case of *Ex parte Sekeres*, 646 So. 2d at 642, is appropriate here:

> "A writ of mandamus will not be issued unless there is a clear showing of error on the part of the trial court. *Ex parte Rosebusch, Inc.*, 558 So. 2d 356 (Ala. 1990). Having studied the complaint; the motion to dismiss, with the attached affidavit of Charles E. Sekeres; and the deposition of Sekeres offered in the case of *Allen v. Physicians Weight Loss Centers* (CV-89-001969, Mobile Circuit Court), I cannot hold at this stage of the proceeding that the petitioner has made a clear showing of error on the part of the trial court (*Ex parte Rosebusch, Inc.*) or that the petitioner has a clear and undisputable right to the relief sought. It may well be that *in personam* jurisdiction of Sekeres exceeds the limits of due process, but I cannot say, based upon the record now before this Court, that the trial court clearly erred in denying the motion to dismiss or that Sekeres has a' clear and undisputable right to be dismissed from this action."

Without contradiction, the affidavit of the defendant Borka denies any physical presence in Alabama whatsoever. The plaintiff's pleadings do not allege that either Shingleton or McInnis was acting as Borka's agent or partner when either traveled into Alabama. The plaintiff also does not expressly allege that Borka shared or participated in the intentions and purposes of Shingleton or McInnis to develop a market specifically in the state of Alabama. Likewise, while the last cause of action in the plaintiff's amended complaint

expressly alleges that McInnis, Borka, and Shingleton, as well as other defendants, conspired together in most aspects of their alleged tortious conduct, these pleadings do not allege that they conspired together in marketing the product within Alabama.

> "'Bald speculation' or a 'conclusionary statement' that individuals are co-conspirators is insufficient to establish personal jurisdiction under a conspiracy theory. *Naartex Consulting Corp. v. Watt*, 722 F.2d 779, 787 (D.C. Cir. 1983), *cert. denied*, 457 U.S. 1210, 104 S.Ct. 2399, 81 L.Ed.2d 355 (1984). Instead, the plaintiff must plead with particularity 'the conspiracy as well as the overt acts within the forum taken in furtherance of the conspiracy.' *Dooley v. United Technologies Corp.*, 786 F.Supp. 65, 78 (D.D.C. 1992) (citing *Naartex*, 722 F.2d at 787 and *First Chicago Int'l v. United Exchange Co., Ltd.*, 836 F.2d 1375, 1378-79 (D.C. Cir. 1988))."

Jungquist v. Sheikh Sultan Bin Khalifa Al Nahyan, 115 F.3d 1020, 1031 (D.C. Cir. 1997). Absent express and sufficient allegations of either agency of McInnis or Shingleton or both for Borka, or a conspiracy between or among Borka and McInnis, Shingleton, or both, specifically to develop Alabama as a market, we cannot impute to Borka, for the purpose of supporting personal jurisdiction over him, either the intentions and purposes of McInnis or Shingleton to develop Alabama as a market or their physical presences in Alabama.

The pleadings and affidavits in this case do not establish contacts between Borka and the state of Alabama sufficient to pass the tests of *Asahi* and *Sudduth*, *supra*. Accordingly, the trial judge erred in denying Borka's motion to dismiss for want of personal jurisdiction. Therefore, Borka is entitled to a writ of mandamus directing the trial judge to vacate her order denying Borka's motion to dismiss and to enter an order granting Borka's motion to dismiss.

In our case number 1990659, *Ex parte Pamela Alice Little Daniel*, the plaintiff herself has petitioned us for a writ of mandamus directing the trial judge to vacate the order she entered striking certain exhibits the plaintiff proffered at the hearing on the defendants' motions to dismiss for want of personal jurisdiction. The exhibits consist of materials introduced in a similar civil action by a different plaintiff against Snap Products, Inc., and Sam McInnis, but not against either Tim Shingleton or Michael Borka, in a federal district court in Minnesota.

The plaintiff has agreed anticipatorily that our sustaining the denial of the defendants McInnis's and Shingleton's motions to dismiss for want of personal jurisdiction moots the plaintiff's petition for a writ of mandamus insofar as it seeks relief from the trial judge's order granting those two defendants' motions to strike the plaintiff's exhibits. Thus we will address the plaintiff's petition for a writ of mandamus only insofar as it addresses the trial judge's order granting the defendant Borka's motion to strike the plaintiff's exhibits.

We are granting mandamus relief to the defendant Borka on the ground that he had insufficient contacts with the state of Alabama to support personal jurisdiction. From our examination of the plaintiff's proffered exhibits, we conclude that none of them constitute admissible evidence of sufficient contacts between Borka and the state of Alabama to support the exercise of personal jurisdiction over him. Therefore, we cannot and do not hold that the trial judge abused her discretion in excluding these exhibits for this purpose. No mandamus relief is due the plaintiff on her petition.

1990045 – WRIT DENIED AS TO DEFENDANTS MCINNIS AND SHINGLETON; WRIT GRANTED AS TO DEFENDANT BORKA.

Moore, C.J., and Houston, Harwood, and Woodall, JJ., concur.

See, Lyons, and Brown, JJ., concur in the result in part and dissent in part.

Stuart, J., recuses herself.*

1990659 – PETITION DISMISSED AS MOOT IN PART AND DENIED IN PART.

Moore, C.J., and Houston, Harwood, and Woodall, JJ., concur.

See, Lyons, and Brown, concur in part and concur in the result in part.

Stuart, J., recuses herself.*

*Justice Stuart was the trial judge in this case.

LYONS, Justice (concurring in the result in part and dissenting in part as to 1990045 and concurring in part and concurring in the result in part as to 1990659).

As to the holdings that Borka is not subject to *in personam* jurisdiction in the Baldwin Circuit Court and that Shingleton is subject to that court's personal jurisdiction, I concur in the result. As to the holding that McInnis is subject to *in personam* jurisdiction in that court, I respectfully dissent. The majority opinion improperly displaces the long-standing constitutional requirement of "minimum contacts" with a new, sliding scale based upon subjective views of the reprehensibility of the defendant's alleged conduct

The Due Process Clause of the Fourteenth Amendment to the United States Constitution provides: "No State shall . . . deprive any person of life, liberty, or property, without due process of law." U.S. Const. amend. XIV, § 1. The United States Supreme Court has interpreted this clause to permit a forum state to subject a nonresident defendant to a lawsuit in its courts only when that party has sufficient "minimum contacts." *International Shoe Co. v. Washington*, 326 U.S. 310, 316 (1945). The sufficiency of a party's contacts are assessed as follows:

> "Two types of contacts can form a basis for personal jurisdiction: general contacts and specific contacts. General contacts, which give rise to general personal jurisdiction, consist of the defendant's contacts with the forum state that are unrelated to the cause of action and that are both 'continuous and systematic.' *Helicopteros Nacionales de Colombia, S.A. v. Hall*, 466 U.S. 408, 414 n.9, 415 . . . (1984); [other citations omitted] Specific contacts, which give rise to specific jurisdiction, consist of the defendant's contacts with the forum state that are related to the cause of action. *Burger King Corp. v. Rudzewicz*, 471 U.S. 462, 472-75 . . . (1985). Although the related

> contacts need not be continuous and systematic, they must rise to such a level as to cause the defendant to anticipate being haled into court in the forum state. *Id.*"

Ex parte Phase III Constr., Inc., 723 So. 2d 1263, 1266 (Ala. 1998) (Lyons, J., concurring in the result). The majority opinion does not say whether McInnis's contacts are sufficient to subject him to general *in personam* jurisdiction or to specific *in personam* jurisdiction. However, neither is appropriate in this case.

McInnis served as a vice president and as chief executive officer of Snap Products, Inc., and was a stockholder in the company. In his affidavit, he states that he has been to Alabama only once, to call on an automobile parts supply company in Tuscaloosa. The supplier did not sell the Fix-A-Flat product at the time of his visit. The purpose of his visit was to convince the supplier to carry a particular line of products; that line *did not* include Fix-A-Flat. He was unsuccessful in this effort, and the supplier did not add any new Snap products to its stores.

Even though McInnis admits that he visited Alabama on behalf of Snap Products, his visit cannot be the proximate cause of the decedent's injuries because no sale of the Fix-A-Flat product was made as a result of his visit. The majority opinion reasons that *if* McInnis had succeeded in selling this unrelated line of products, the sales *would have* promoted the brand name and thus *would have* promoted the sales of Fix-A-Flat. While this presents an interesting theoretical possibility, the majority opinion does not explain how McInnis's one contact with Alabama *actually* contributed to the decedent's death. This Court has held that the contacts necessary for specific *in personam* jurisdiction must represent "a clear, firm nexus between the acts of the defendant and the consequences complained of." *Duke v. Young*, 496 So. 2d 37, 39 (Ala. 1986); see also *Ex parte Kamilewicz*, 700 So. 2d 340, 345 n.2 (Ala. 1997). Because the decedent's death did not arise from, or represent a clear, firm nexus to, McInnis's one

contact with Alabama, the trial court cannot obtain specific personal jurisdiction over McInnis. *Duke*, 496 So. 2d at 39.

McInnis also did not have the "continuous and systematic" contacts necessary to subject him to general *in personam* jurisdiction in Alabama. McInnis was in Alabama one time, in an unsuccessful attempt to sell a product other than the product that killed the decedent. As both a matter of law and English such contact is not "continuous and systematic." Contrary to the majority opinion, McInnis would have little reason to suspect that because of his one short, unsuccessful trip to sell a product unrelated to the one that killed the decedent, he had subjected himself to the jurisdiction of the courts of this state for any and all claims against him.

Perhaps to bolster McInnis's insufficient contacts to meet the minimum necessary for *in personam* jurisdiction, the majority opinion also notes that McInnis did not deny that he formulated, manufactured, labeled, and distributed the product that killed the decedent, even after he was aware that it was actually explosive. The majority opinion then concludes that "the reprehensible extent of McInnis's culpability . . . increases the importance of McInnis's contacts with Alabama enough that 'it is fair and reasonable to require [him] to come to this state to defend an action' . . . and enough that 'he should reasonably [have] anticipat[ed] being haled into court' here." ___ So. 2d at ___, quoting *Sudduth v. Howard*, 646 So. 2d 664, 667 (Ala. 1994) (bracketed language in original). The majority opinion cites no authority for its proposition that the reprehensibility of a nonresident defendant's conduct so "increases the importance" (___ So. 2d at ___) of a defendant's single contact with a state as to make constitutional an otherwise unconstitutional exercise of *in personam* jurisdiction, and I am not aware of any such authority. The majority opinion's new sliding-scale-*in personam*-jurisdiction test would mean that the more reprehen-

sible an out-of-state defendant's conduct is alleged to be,[1] the less actual contacts with a forum state need be shown to subject the defendant to general *in personam* jurisdiction.

Moreover, the majority marshals no evidence that McInnis's reprehensible conduct was targeted at Alabama. In *Sudduth v. Howard*, 646 So. 2d 664 (Ala. 1994), this Court stated its adherence to the rule of *Calder v. Jones*, 465 U.S. 783 (1984), and held that mere untargeted negligence would not suffice to create personal jurisdiction over a company's executives. In *Brooks v. Inlow*, 453 So. 2d 349, 354 (Ala. 1984), this Court held that the circuit court did not have *in personam* jurisdiction over two corporate executive defendants because their actions constituted no more than "untargeted negligence." If a corporate executive were subjected to the jurisdiction of every state where an injury occurred that was connected to a decision made by the executive, without regard to the executive's contacts with that state, then the long-standing constitutional test of "minimum contacts" would be erased. Such executives would effectively be subject to nationwide jurisdiction for claims arising from their alleged negligence. In the absence of any evidence that McInnis's allegedly "reprehensible" conduct was directed at the citizens of this state, those actions are merely untargeted negligence and cannot provide the basis for general *in personam* jurisdiction over McInnis. Should the plaintiff's allegations about McInnis's conduct prove to be true, I would agree with the majority's pejorative characterization of his conduct. However, *in personam* jurisdiction turns on the level of contacts, not the severity of wrongdoing.

---

[1] The majority notes that McInnis does not deny the plaintiff's allegations, but that fact is irrelevant to the sufficiency of his contacts with Alabama for *in personam* jurisdiction. The evidence must be viewed in the light most favorable to the nonmovant plaintiff. Charles Alan Wright & Arthur R. Miller, 5A *Fed. Prac. & Prod. Civ. 2d* § 1351 (2000).

As to Shingleton, I concur in the result that he is subject to the *in personam* jurisdiction of the Baldwin circuit court. Shingleton's four visits to this state did not directly result in or represent a clear, firm nexus to the decedent's death. *Duke*, 496 So. 2d at 39. However, his four trips to this state in three years to sell Snap products, including attempts to sell the Fix-A-Flat product, are sufficient to establish a pattern of business in this state. Thus, he may properly be subjected to the general *in personam* jurisdiction of the Baldwin Circuit Court,

Concerning case number 1990659, the plaintiff's petition for mandamus, I concur in part and concur in the result in part. I concur as to the holdings that the petition is moot as to defendant Shingleton and that the petition should be denied as to defendant Borka.

As to defendant McInnis, after reviewing the plaintiff's proffered exhibits, I would conclude that they do not constitute admissible evidence of sufficient contacts between McInnis and this state to support the exercise of *in personam* jurisdiction over him. The trial court did not abuse its discretion in excluding these exhibits for Rule 12(b)(2), Ala. R. Civ. P., purposes as to McInnis. Thus, I would deny the plaintiff's petition as to McInnis.

See and Brown, JJ., concur.

APPENDIX B

ALABAMA JUDICIAL DATA CENTER
IN THE CIRCUIT COURT OF BALDWIN

PAMELA ALICE LITTLE DANIEL ET AL	VS:	PANDORA MANU-FAC-TURING INC ET AL
FRAZER, A DANNER, JR. P.O. BOX 1686 MOBILE AL 3663		CASE NUMBER: CV 1998 001113 00 PARTY NUMBER: D001

NOTICE

6/23/99 — AFTER ORAL ARGUMENT, MCINNIS' MOTION TO DISMISS IS DENIED, BORKA'S MOTION TO DISMISS IS DENIED AND SINGLETON'S MOTION TO DISMISS IS DENIED

NOTICE ISSUED ON: 06/25/1999

JUDGE: LYN L. STUART
BALDWIN COUNTY COURTHOUSE

(06/25/1999) JUD

APPENDIX C

IN THE CIRCUIT COURT OF BALDWIN COUNTY, ALABAMA

PAMELA ALICE LITTLE DANIEL, Administratrix of the Estate of JOE ED DANIEL, Deceased,	*	
Plaintiff,	*	CIVIL ACTION
VS.	*	
PANDORA MANUFACTURING, INC., formerly known as SNAP PRODUCTS, INC.; SNAP PRODUCTS, INC.; SNAP AUTOMOTIVE PRODUCTS, INC.; HUGHTONE INDUSTRIES, INC.; PAUL HUGHETT; MONTFORT A. JOHNSEN AND ASSOCIATES, LTD.; MONTFORT A. JOHNSEN; SAFETY CONSULTING ENGINEERS, INC.; JAMES C. DAHN; PENNZOIL - QUAKER STATE COMPANY (f/k/a PENNZOIL PRODUCTS COMPANY); NATIONWIDE INDUSTRIES, INC.; SAM McINNIS; MICHAEL BORKA; TIM SHINGLETON; AEROFIL TECHNOLOGY, INC.; SWEAT TIRE COMPANY INCORPORATED; A, B, C, D, E and/or F, the person, firm or corporation who formulated, manufactured, sold, labeled, packaged, supplied and/or distributed the Fix-A-Flat *Non-Explosive Formula* aerosol tire sealant/inflator involved in the accident made the basis of this suit; G, H, I, J, K and/or L, the person, firm or corporation	*	AMENDED COMPLAINT NO:CV-98-1113

who packaged the Fix-A-Flat *Non-Explosive Formula* aerosol tire sealant/inflator involved in the accident made the basis of this suit; M, N, O, P, Q and/or R, the person, firm or corporation who modified, converted and/or altered the tire and rim assembly involved in the accident made the basis of this suit, all of whose true names and legal identities are otherwise unknown to the Plaintiff at this time, but will be substituted by amendment when ascertained, individually and jointly,

Defendants.

GENERAL ALLEGATIONS

1. Plaintiff is a resident of the State of Alabama.

* * *

4. Defendants Sam McInnis ("McInnis"), Michael Borka ("Borka"), and Tim Shingleton ("Shingleton") were, at all times relevant hereto, residents of the state of North Carolina and were either employed in managerial capacities, or were owners and/or officers of defendants Nationwide Industries, Inc.; and/or Snap Products, Inc.; and/or Snap Automotive Products, Inc.; and/or Pandora Manufacturing, Inc. and in such capacities acted as agents for the companies.

* * *

11. At all times relevant hereto, defendants Pandora Manufacturing, Inc., formerly known as Snap Products, Inc.; Snap Products, Inc.; Snap Automotive Products, Inc.; Pennzoil – Quaker State Company; and Nationwide Industries, Inc. were engaged in the business of manufacturing and marketing an aerosol tire inflator product ("fix a flat") throughout the United States, including the state of Alabama.

* * *

67. On or about June 4, 1997, Joe Ed Daniel, attempted to affix a small metal block, or lug, to a motor grader rim with a tire attached which had been previously inflated with

two cans of the DME **"fix a flat NON-EXPLOSIVE FORMULA"** tire inflator product.

68. Mr. Daniel, while performing a brief tacking repair to affix the metal block to the motor grader tire rim, was killed when the flammable DME propellant from the "fix a flat" product ignited and propelled the tire and/or components of the rim assembly into him thereby resulting in his being decapitated.

* * *

75. The **"fix a flat NON-EXPLOSIVE FORMULA"** part number S455K, DOT 2Q involved in the accident made the basis of this suit was formulated, manufactured, labeled, packaged, sold, supplied and/or distributed by the Defendants, PANDORA MANUFACTURING, INC., formerly known as SNAP PRODUCTS, INC.; SNAP PRODUCTS, INC.; SNAP AUTOMOTIVE PRODUCTS, INC.; HUGHTONE INDUSTRIES, INC.; PAUL HUGHETT; MONTFORT A. JOHNSEN AND ASSOCIATES, LTD.; MONTFORT A. JOHNSEN; SAFETY CONSULTING ENGINEERS, INC.; JAMES C. DAHN; PENNZOIL – QUAKER STATE COMPANY (f/k/a PENNZOIL PRODUCTS COMPANY); NATIONWIDE INDUSTRIES, INC.; SAM McINNIS; MICHAEL BORKA; TIM SHINGLETON; AEROFIL TECHNOLOGY, INC.; SWEAT TIRE COMPANY INCORPORATED; A, B, C, D, E, F, G, H, I, J, K, L, M, N, O, P, Q, and R.

76. Prior to June 4, 1997, the Defendants PANDORA MANUFACTURING, INC., formerly known as SNAP PRODUCTS, INC.; SNAP PRODUCTS, INC.; SNAP AUTOMOTIVE PRODUCTS, INC.; HUGHTONE INDUSTRIES, INC.; PAUL HUGHETT; MONTFORT A. JOHNSEN AND ASSOCIATES, LTD.; MONTFORT A. JOHNSEN; SAFETY CONSULTING ENGINEERS, INC.; JAMES C. DAHN; PENNZOIL – QUAKER STATE COMPANY (f/k/a PENNZOIL PRODUCTS COMPANY); NATIONWIDE INDUSTRIES, INC.; SAM McINNIS; MICHAEL BORKA; TIM SHINGLETON; AEROFIL TECH-

NOLOGY, INC.; SWEAT TIRE COMPANY INCORPORATED; A, B, C, D, E, F, G, H, I, J, K, L, M, N, O, P, Q, and R, either formulated, manufactured, labeled, packaged, sold, supplied and/or distributed the **"fix a flat NON-EXPLOSIVE FORMULA"** tire inflator/sealant involved in the accident made the basis of this suit.

* * *

81. Plaintiff further alleges that the injuries and subsequent death of Joe Ed Daniel was proximately caused by the negligence of the Defendants PANDORA MANUFACTURING, INC., formerly known as SNAP PRODUCTS, INC.; SNAP PRODUCTS, INC.; SNAP AUTOMOTIVE PRODUCTS, INC.; HUGHTONE INDUSTRIES, INC.; PAUL HUGHETT; MONTFORT A. JOHNSEN AND ASSOCIATES, LTD.; MONTFORT A. JOHNSEN; SAFETY CONSULTING ENGINEERS, INC.; JAMES C. DAHN; PENNZOIL – QUAKER STATE COMPANY (f/k/a PENNZOIL PRODUCTS COMPANY); NATIONWIDE INDUSTRIES, INC.; SAM McINNIS; MICHAEL BORKA; TIM SHINGLETON; AEROFIL TECHNOLOGY, INC.; SWEAT TIRE COMPANY INCORPORATED; A, B, C, D, E, F, G, H, I, J, K, L, M, N, O, P, Q, and R, in one or more of the following respects:

a. Negligently formulating and/or manufacturing the **"fix a flat NON-EXPLOSIVE FORMULA"** involved in the accident made the basis of this suit;

b. Negligently selling, supplying and/or distributing the **"fix a flat NON-EXPLOSIVE FORMULA"** made the basis of this suit when the Defendants knew or in the exercise of reasonable care, should have known that said product referred to above was in a defective and unreasonably dangerous condition;

c. Negligently selling, supplying and/or distributing a flammable and explosive product when other non-flammable and non-explosive formu-

lations were available in the marketplace for the purpose of providing emergency and/or temporary tire repairs;

d. Negligently failing to provide adequate warnings to the decedent and others similarly situated as to inherent dangers associated with the use *of* **"fix a flat NON-EXPLOSIVE FORMULA"** of which the Defendants were aware;

e. Negligently failing to warn the decedent and others similarly situated of the dangerous, flammable and explosive propensities of the **"fix a flat NON-EXPLOSIVE FORMULA"** made the basis of this suit;

f. Negligently labeling and/or packaging the **"fix a flat NON-EXPLOSIVE FORMULA"** made the basis of this suit;

g. Negligently failing to adequately test the explosiveness and/or flammability of the **"fix a flat NON-EXPLOSIVE FORMULA"** made the basis of this suit;

h. Negligently failing to adequately test the **"fix a flat NON-EXPLOSIVE FORMULA"** to determine that it was safe for its intended uses and purposes;

i. Negligently misrepresenting that the **"fix a flat NON-EXPLOSIVE FORMULA"** made the basis of this suit was a *Non-explosive Formula*, when the Defendants knew or should have known of its dangerous flammable and/or explosive characteristics;

j. Negligently continuing to manufacture, sell, supply and/or distribute **"fix a flat "NON-EXPLOSIVE FORMULA"** after said product was known by the Defendants to be flammable, explosive and unreasonably dangerous for its intended uses;

k. Negligently continuing to manufacture, sell, supply and/or distribute **"fix a flat NON-EXPLOSIVE FORMULA"** which was extremely flammable and explosive after a safe formulation was available.

l. Negligently failing to take appropriate measures to remedy the defective nature of the **"fix a flat NON-EXPLOSIVE FORMULA"** made the basis of this suit.

m. Negligently failing to remove and/or recall **"fix a flat NON-EXPLOSIVE FORMULA"** from the marketplace after becoming aware of the flammable, explosive and unreasonably dangerous propensities of the product.

* * *

83. Plaintiff further alleges that the injuries and subsequent death of the said Joe Ed Daniel was proximately caused by the wanton conduct of the Defendants PANDORA MANUFACTURING, INC., formerly known as SNAP PRODUCTS, INC.; SNAP PRODUCTS, INC.; SNAP AUTOMOTIVE PRODUCTS, INC.; HUGHTONE INDUSTRIES, INC.; PAUL HUGHETT; MONTFORT A. JOHNSEN AND ASSOCIATES, LTD.; MONTFORT A. JOHNSEN; SAFETY CONSULTING ENGINEERS, INC.; JAMES C. DAHN; PENNZOIL – QUAKER STATE COMPANY (f/k/a PENNZOIL PRODUCTS COMPANY); NATIONWIDE INDUSTRIES, INC.; SAM McINNIS; MICHAEL BORKA; TIM SHINGLETON; AEROFIL TECHNOLOGY, INC.; SWEAT TIRE COMPANY INCORPORATED; A, B, C, D, E, F, G, H, I, J, K, L, M, N, O, P, Q, and R, in one or more of the following respects:

a. Wantonly formulating and/or manufacturing the **"fix a flat NON-EXPLOSIVE FORMULA"** involved in the accident made the basis of this suit;

b. Wantonly selling, supplying and/or distributing the **"fix a flat NON-EXPLOSIVE FORMULA"** made the basis of this suit when the Defendants knew or in the exercise of reasonable care, should have known that said product referred to above was in a defective and unreasonably dangerous condition;

c. Wantonly selling, supplying and/or distributing a flammable and explosive product when other non-flammable and non-explosive formulations were available in the marketplace for the purpose of providing emergency and/or temporary tire repairs;

d. Wantonly failing to provide adequate warnings to the decedent and others similarly situated as to inherent dangers associated with the use of **"fix a flat NON-EXPLOSIVE FORMULA"** of which the Defendants were aware;

e. Wantonly failing to warn the decedent and others similarly situated of the dangerous, flammable and explosive propensities of the **"fix a flat NON-EXPLOSIVE FORMULA"** made the basis of this suit;

f. Wantonly labeling and/or packaging the **"fix a flat NON-EXPLOSIVE FORMULA"** made the basis of this suit;

g. Wantonly failing to adequately test the explosiveness and/or flammability of the **"fix a flat NON-EXPLOSIVE FORMULA"** made the basis of this suit;

h. Wantonly failing to adequately test the **"fix a flat NON-EXPLOSIVE FORMULA"** to determine that it was safe for its intended uses and purposes;

i. Wantonly misrepresenting that the **"fix a flat NON-EXPLOSIVE FORMULA"** made the

basis of this suit was a *Non-explosive Formula*, when the Defendants knew or should have known of its dangerous flammable and/or explosive characteristics;

j. Wantonly continuing to manufacture, sell, supply and/or distribute **"fix a flat"** as a **"NON-EXPLOSIVE FORMULA"** after said product was known by the Defendants to be flammable, explosive and unreasonably dangerous for its intended uses;

k. Wantonly continuing to manufacture, sell, supply and/or distribute **"fix a flat NON-EXPLOSIVE FORMULA"** which was extremely flammable and explosive after a safe formulation was available.

l. Wantonly failing to take appropriate measures to remedy the defective nature of the **"fix a flat NON-EXPLOSIVE FORMULA"** made the basis of this suit.

m. Wantonly failing to remove and/or recall **"fix a flat NON-EXPLOSIVE FORMULA"** from the marketplace after becoming aware of the flammable, explosive and unreasonably dangerous propensities of the product.

Supreme Court, U.S.
FILED
APR 5 2002
OFFICE OF THE CLERK

No. 01-1290

In The

Supreme Court of the United States

SAM MCINNIS AND TIM SHINGLETON,

Petitioners,

v.

PAMELA ALICE LITTLE DANIEL,
AS ADMINISTRATRIX OF THE
ESTATE OF JOE ED DANIEL,

Respondent.

On Petition For Writ Of Certiorari To The Supreme Court Of Alabama

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

Respondent disagrees with the "Questions Presented" in the Petition, as will be explained within. Respondent asserts that the following are the questions pertinent to a decision whether to grant the petition for certiorari:

1. Whether there is a final judgment below sufficient to invoke review by this Court pursuant to 28 U.S.C. § 1257(a)?

2. If so, whether this Court should nevertheless decline to exercise jurisdiction because of the preliminary, fact-dependent, and undeveloped character of the presentation of and rulings on the assertions regarding Petitioners' contacts with Alabama?

3. Was there error, much less error of constitutional magnitude, in the Supreme Court of Alabama's holding that Petitioners did not present in their mandamus petition an indisputable case for lack of minimum contacts, given the applicable standards of review and the avowed non-finality of the denial of their motions to dismiss and the denial of their mandamus petition?

PARTIES TO THE PROCEEDING

Respondent Pamela Alice Little Daniel, as Administratrix of the Estate of Joe Ed Daniel, will be referred to herein as Mrs. Daniel or Plaintiff. She is the widow of Joe Ed Daniel, whose death is the subject of the wrongful death action against Petitioners and other defendants in the Circuit Court of Baldwin County, Alabama. In the years just preceding Mr. Daniel's death, Petitioner Sam McInnis ("McInnis") was the Vice President of Sales and then the Chief Executive Officer of the corporations that produced and marketed the explosive, but deceptively labeled as non-explosive, product known as "fix a flat"[1] that killed Mr. Daniel. In the same time period Petitioner Tim Shingleton ("Shingleton") was a Regional Sales Manager or Vice President of Sales and then President of Operations of the two corporations that successively marketed fix a flat just prior to Mr. Daniel's death. From September 1993 through March 1995, the relevant corporation was Snap Products, Inc. From April 1995 through the time of Mr. Daniel's death on June 4, 1997, and until November 1997, the relevant corporation was Snap Automotive Products, Inc. Michael Borka, whose petition for mandamus the Supreme Court of Alabama granted, was Chief Financial Officer of Snap Automotive Products, Inc., from April 1995 through November 1997. (App. A to

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[1] The name of this product is written in various ways in these proceedings. Photographic exhibits in the trial record show the name without capital "F's" or hyphens and with a trademark symbol following "fix a flat."

PARTIES TO THE PROCEEDING – Continued

Petition, p. 10a.) McInnis and Shingleton were officers of Snap Products, Inc., when they, together with Borka, formed Snap Automotive Products, Inc., and caused it to purchase Snap Products, Inc., in April 1995. (*Id.*; App. A to this Brief, ¶ 56.)

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BRIEF IN OPPOSITION TO CERTIORARI

Mrs. Daniel respectfully submits that Petitioners McInnis and Shingleton have overstated the precedential importance of the denial of mandamus by the Supreme Court of Alabama and have ignored its lack of finality. In the introductory paragraph of their Petition, McInnis and Shingleton assert that their supposedly "very limited contacts" with Alabama "have nothing to do with" Mrs. Daniel's cause of action. (Petition, p. 1.) On the contrary, their tortious conduct resulted in the sale in Alabama of the dangerous product that caused Mr. Daniel's death. They further erroneously state that the Supreme Court of Alabama has "attribut[ed] to defendants the actions of other parties," *id.*, when it is the personal actions of McInnis and Shingleton that principally caused the production and sale of the explosive and dangerously mislabeled fix a flat product that caused Mr. Daniel's death. Thus, even aside from the jurisdictional and prudential concerns argued as issues one and two below, this case presents no color of merit that would justify granting the Petition.

OPINION BELOW

Because the opinion of the Supreme Court of Alabama remains unpublished, Respondent will cite to the copy of that opinion presented to the Court as "App. A to Petition."

JURISDICTION

As a threshold matter, this Court lacks jurisdiction because there is no final judgment below. The Supreme Court of Alabama has expressly held that " '[T]he denial of relief by mandamus does not have *res judicata* effect.' " *Ex parte Shelton*, [Ms. 1990366, Sept. 7, 2001; 2001 WL 1021585, p. **3] ___ So.2d ___, ___ (Ala. 2001) (alteration in original; citations omitted). In the opinion now under review, the Supreme Court of Alabama expressly noted the interlocutory nature of a denial of a motion to dismiss

for lack of *in personam* jurisdiction, Ala.R.Civ.P. 12(b)(2), and the non-final nature of the denial of mandamus. (App. A to Petition, pp. 3a-4a, 18a.) Therefore, Petitioners erroneously invoke this Court's jurisdiction pursuant to 28 U.S.C. § 1257(a), which requires a "[f]inal judgment[ ] . . . rendered by the highest court of a State."

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

"[T]he Supreme Court shall have appellate Jurisdiction, both as to Law and Fact, with such Exceptions, and under such Regulations as the Congress shall make." U.S. Const. art. III, § 2, ¶ 3. "Final judgments or decrees rendered by the highest court of a State in which a decision could be had, may be reviewed by the Supreme Court by writ of certiorari . . . where any title, right, privilege, or immunity is specially set up or claimed under the Constitution or the treaties or statutes of . . . the United States." 28 U.S.C. § 1257(a).

STATEMENT OF THE CASE

Pursuant to Rule 15.2 of the Rules of this Court, Mrs. Daniel will address the facts that bear on what issues would be before the Court if certiorari were granted. The Petition seriously understates the facts which support the exercise of *in personam* jurisdiction over Petitioners. For example, Petitioners attached as an appendix a drastically edited version of the Amended Complaint that does not present to this Court the many uncontested allegations of fact supporting jurisdiction. Mrs. Daniel therefore attaches as App. A to this Brief In Opposition the entire Amended Complaint. The complete allegations of that complaint, together with the affidavits filed by Petitioners, provide the factual context in this case. The pertinent portions of the affidavits are quoted in the opinion of the Supreme Court of Alabama, App. A to the Petition, pp. 8a-10a.

The Amended Complaint alleges that Petitioners personally participated in formulating, manufacturing, labeling, and distributing the fix a flat product dangerously mislabeled as "non-explosive." (App. A to this Brief, *passim*, esp. ¶¶ 4, 11, 13-14, 42-57, 75, 81, and 83.) Little discovery took place between the filing of Plaintiff's original Complaint on December 18, 1998, and the denial of the motions to dismiss on June 23, 1999. (Respondent's brief, Supreme Court of Alabama Docket #1990045, Ex. 1, Case Action Summary.)[2] Mrs. Daniel offered in opposition to the motions to dismiss certain documents ("the *Olson* materials") from a similar action against some of these defendants in Minnesota.[3] (Mrs. Daniel's cross-petition, Supreme Court of Alabama docket #1990659, Exhibit 9.) These materials were directed principally at the activities of McInnis, because Shingleton was not named as a defendant in *Olson*. *Id.* However, Shingleton has admitted in his affidavit in this case that he was at the relevant times a regional director of sales, a vice president of sales, and then president of operations. (App. A to Petition, p. 10a.) These facts, coupled with the facts established against

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[2] The "record" on the petitions for mandamus consists only of exhibits that the Petitioners and the Respondents submitted to the Supreme Court of Alabama. Ala.R.App.P. 21. These materials are somewhat voluminous and would be difficult to duplicate, because they include handwritten notations, letterheads, and other materials that would not be amenable to typesetting. Because the points made regarding some of these exhibits in this and the succeeding paragraph are incidental and procedural, Mrs. Daniel is not appending them to this brief. However, if the Court were to grant the Petition, Mrs. Daniel would request that the exhibits referenced in these paragraphs would be made part of any Joint Appendix or record before this Court. *Cf.* Rule 12.7 of the Rules of this Court.

[3] *See Olson v. Snap Products, Inc.*, 29 F.Supp. 1027 (D. Minn. 1998).

McInnis personally in the *Olson* materials, support inferences that Shingleton, as well as McInnis, personally participated in the tortious marketing of the dangerous fix a flat product in Alabama and other states that caused – before Mr. Daniel's death – injuries at least in Arizona, Colorado, and Minnesota. (*See also* App. A to this Brief, ¶¶ 12-38, 58-67.)

The trial court (the Circuit Court of Baldwin County, Alabama) sustained Petitioners' objection to Mrs. Daniel's offer of the *Olson* materials as evidence in opposition to the motions to dismiss. (Respondent's Brief, Supreme Court of Alabama Docket #1990045, Ex. 1, Trial Court's Docket Entry of 7/15/99.) After Petitioners and Borka filed their mandamus petition, Mrs. Daniel filed a cross-petition for mandamus requesting that, if the Supreme Court of Alabama deemed the order denying the motion to dismiss to be infirm, the court would order further evidentiary proceedings, including the allowance of the *Olson* materials and the conduct of further discovery regarding the contacts of McInnis, Shingleton, and Borka with Alabama. (Petition for Writ of Mandamus, Supreme Court of Alabama Docket #1990659, esp. pp. 10-11.) The Supreme Court of Alabama denied relief on the cross-petition, deeming it moot as to McInnis and Shingleton, and not probative as to the contacts of Borka. (App. A to Petition, p. 20a.)

Mrs. Daniel does not contest the grant of mandamus relief in favor of Borka, who was the finance officer of Snap Automotive Products, Inc., from the time of acquisition of Snap Products, Inc., in April 1995 until the sale of that company to Pennzoil in 1997. McInnis and Shingleton were directly involved in operations and sales of both companies. Mrs. Daniel cannot at present make similar allegations against Borka, and his affidavit does not bridge the gap by admitting trips to Alabama on company business or official responsibility for sales and/or operations. (App. A to Petition, p. 10a.)

I. Factual Background

In April 1995, Petitioners and former Defendant Borka formed Snap Automotive Products, Inc., and purchased Snap Products, Inc. (App. A to this Brief, ¶ 56.) Snap Products, Inc., and then Snap Automotive Products, Inc., manufactured and sold an aerosol tire inflator product ("fix a flat") throughout the United States, including the State of Alabama. (*Id.*, ¶ 11.) From September 1993 to March 1995, McInnis was Vice-President of Sales, and Shingleton was a Regional Sales Manager or Vice-President of Sales. From April 1995 to November 1997, McInnis was Chief Executive Officer, and Shingleton was President of Operations. (App. A to Petition, p. 10a.) As Regional Sales Manager or Vice-President of Sales, Shingleton came to Alabama to promote sales of Snap products on four occasions that he admitted in his affidavits. (*Id.* at 8a-10a.) McInnis, in his capacity as Vice-President of Sales, also came to Alabama to promote the sales of Snap products in 1994 or 1995. (*Id.*, pp. 9a-10a.)[4]

Thus, even before they became the owners of the company, McInnis and Shingleton visited Alabama to promote the sales of Snap products. It can be inferred from the fact that Shingleton visited Alabama four times while he was a Regional Sales Manager that Alabama was within his region. Because little discovery occurred before the trial court proceeded to hear McInnis, Shingleton, and Borka's motions to dismiss, however, Plaintiffs have not cross-examined them regarding their affidavits or otherwise conducted discovery to determine what additional

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[4] Although their affidavits attempt to minimize the importance of fix a flat as a Snap product and its relevance to their Alabama trips, fix a flat was "the single largest revenue generating product sold by Nationwide/Snap, and of approximately 70 company products, sales of the 'fix a flat' product constitute[d] approximately half the company's revenue." (App. A to this Brief, ¶ 15.)

contacts they may have with Alabama beyond those admitted in their affidavits.

Important allegations about the participation of McInnis and, by inference, Shingleton in communications with Snap customers are found at paragraphs 39 and 47-51 of the Amended Complaint:

> 39. During 1990-1993, while Nationwide/Snap and Mr. McInnis were marketing their second generation HCFC non-flammable propellant "fix a flat" product, the company spent significant sums of money educating the public, and the tire inflator industry, as to the safety benefits of a non-flammable propellant tire inflator product in view of foreseeable rim welding and tire reaming activity.
>
> 47. On or about April 25, 1994, Mr. McInnis, along with "consultants" Montfort A. Johnsen ("Johnsen"), and Paul Hughett ("Hughett") attended a meeting in Kansas City, Missouri, with a customer (Western Auto Parts Company). Johnsen and Hughett had helped design and develop the third generation DME "fix a flat" product.
>
> 48. At the meeting with Western Auto on or about April 25, 1994, Mr. McInnis, with consultants Hughett and Johnsen, tried to sell Western Auto the DME "fix a flat" product. However, Western Auto informed McInnis, Johnsen, and Hughett that Western Auto's testing of the "fix a flat" revealed that the product was flammable/explosive and Western Auto would not purchase such a product.
>
> 49. In response to Western Auto's concerns regarding the flammability/explosivity of the DME fix a flat product, *Mr. McInnis informed Western Auto that if any accidents occurred involving the DME fix a flat product Snap would fully indemnify and reimburse Western Auto for any liability incurred under the provisions of Snap's*

> *$25,000,000 product liability insurance policy.* Western Auto decided not to do any business with Snap.
>
> 50. *On or about May 12, 1994, Snap and/or Mr. McInnis had tire explosion testing performed. . . . This testing revealed that certain mixtures of the "fix a flat" DME product with air in a tire were explosive and could propel the Ford Explorer tire and rim assemblies as much as 252 feet into the air.*
>
> 51. *Despite test results . . . in the Spring of 1994 indicating the DME fix a flat product was explosive, [other defendants] and Snap conspired to selectively omit tire explosion test sequences from testing reports which were sent to Snap's customers and the Consumer Product Safety Commission. The selectively edited testing reports created the illusion that the fix a flat DME product was safe and non-explosive.*

(App. A to this Brief, ¶¶ 39 and 47-51; emphasis added.) Fix a flat was Snap's flagship product and largest source of revenue (*Id.*, ¶ 15.) As Vice-President of Sales at the time, McInnis would have had responsibility for sending the deceptively edited test sequences to Snap customers (*id.*, ¶¶ 50-51), including those in Alabama. As Regional Manager or Vice-President of Sales, Shingleton would have had similar responsibility. They do not deny in their affidavits that they communicated with Snap customers in Alabama as alleged in paragraphs 39 and 51, together with paragraph 11 of the Amended Complaint. (*Id.*, ¶¶ 11, 39, 51.) Of course, the responsibilities of McInnis and Shingleton for marketing this dangerous product in Alabama would have *increased* when they became, in April 1995, the owners and, respectively, Snap's Chief Executive Officer and President of Operations. (*Id.*, ¶ 56.)

Just a few months after Mr. Daniel's death, McInnis, Shingleton and Borka sold Snap at a handsome profit. (*Id.*, ¶ 71.) The national marketing of Snap's most important product was vital to the Petitioners' effort to sell the company for a profit a mere two and a half years after its purchase.

All that Petitioners deny in their affidavits is frequent physical presence in Alabama. Their affidavits say nothing about their marketing efforts directed toward Alabama, or the number of Snap customers selling fix a flat in Alabama, or anything else to contradict the allegations of the Complaint that they personally directed a marketing campaign of this product that they knew to be dangerous and dangerously mislabeled. They do not deny that this marketing campaign was directed at Alabama or that they were personally responsible for it. They do not deny knowing in the two years prior to Mr. Daniel's death of at least three explosions of the product in Arizona, Colorado, and Minnesota.

Petitioners bore personal responsibility for the distribution of Snap products, including fix a flat, into Alabama, and they have all but admitted it. Certainly their mere denials of frequent physical presence in Alabama do not contradict the direct allegations and available inferences of the Complaint that, as directors of sales and later as owners and directors of the entire corporation, they purposefully marketed and sold in Alabama a dangerous and dangerously mislabeled product.

REASONS FOR DENYING THE WRIT

I. The Judgment Below Is Interlocutory, Not Final, So This Court Does Not Have Jurisdiction

In *Jefferson v. City of Tarrant, Alabama*, 522 U.S. 75 (1997), this Court dismissed the writ of certiorari for want of jurisdiction, because "This case, still *sub judice* in Alabama, was brought to this Court too soon." *Id.* at 77. This Court stated, in remarks directly pertinent here:

> The decision we confront does not qualify as a "final judgment" within the meaning of [28 U.S.C.] § 1257(a). The Supreme Court of Alabama decided the federal-law issue on an interlocutory certification from the trial court, then remanded the cause for further proceedings on petitioners' remaining state-law claims. The outcome of those

> further proceedings could moot the federal question we agreed to decide. If the federal question does not become moot, petitioners will be free to seek our review when the state-court proceedings reach an end. We accordingly dismiss the writ for want of a final judgment.

Id. at 77-78. *See also Florida v. Thomas*, 532 U.S. 774 (2001) (Supreme Court of Florida upheld trial court's interlocutory order granting a motion to suppress evidence; this Court dismissed its writ for want of jurisdiction.)

Exactly the same posture is presented by this Petition for Certiorari, except that here, the Supreme Court of Alabama decided the federal-law issue on a petition for writ of mandamus pursuant to Ala.R.App.P. 21, whereas in *Jefferson*, the Supreme Court of Alabama decided the federal-law issue on an interlocutory certification pursuant to Ala.R.App.P. 5. That is a distinction without a difference, because the Supreme Court of Alabama has held that a denial of a petition for a writ of mandamus does not operate as *res judicata* upon further proceedings in the subject action. *Ex parte Shelton*, [Ms. 1990366, Sept. 7, 2001; 2001 WL 1021585], ___ So.2d ___ (Ala. 2001), and cases cited therein. Moreover, the Supreme Court of Alabama expressly recognized that its denial of mandamus here did not end the question of *in personam* jurisdiction over Petitioners (App. A to Petition, pp. 3a-4a, 18a), so its decision "was avowedly interlocutory." *Jefferson, supra*, 522 U.S. at 81.

Petitioners cite *Mt. Vernon-Woodberry Cotton Duck Co. v. Alabama Interstate Power Co.*, 240 U.S. 30, 31 (1916), and *Fisher v. District Court*, 424 U.S. 382, 385 n. 7 (1976), as supporting the exercise of jurisdiction over this petition. *Mt. Vernon-Woodberry* and *Fisher*, however, merely hold that "[a] judgment that terminates original proceedings in a state appellate court, in which the only issue decided concerns the jurisdiction of a lower state court, is final even if further proceedings are to be had in the lower

court." *Fisher*, 424 U.S. at 385, n. 7 (citations omitted).[5] This principle cannot apply if the state appellate court's judgment terminating the original proceedings therein is, by its own terms, *not* final as to the issue raised. As the Supreme Court of Alabama said, "[w]hether the plaintiff can prove her allegations against the defendants McInnis and Shingleton and can thereby maintain personal jurisdiction at the stages of the litigation that require proof as distinguished from pleadings remains to be seen." (App. A to Petition, p. 18a). The entire tenor of the opinion below is consistent with the holding of *Ex parte Shelton*, *supra*, and the cases cited therein. For example, the court pointed out the heavy burden on a mandamus petitioner:

> A writ of mandamus is an *extraordinary remedy* which requires a showing of (a) *clear legal right* in the petitioner to the order sought, (b) an *imperative duty* on the respondent to perform, accompanied by a refusal to do so, (c) the *lack of another adequate remedy*, and (d) the properly invoked jurisdiction of the court.

(App. A to Petition, p. 4a; emphasis added.) The Supreme Court of Alabama later tied this burden to the interlocutory nature of the 12(b)(2) denial by quoting from a special concurrence in *Ex parte Sekeres*, 640 So.2d

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[5] Footnote 7 of *Fisher* cites three cases, *Madruga v. Superior Court*, 346 U.S. 556, 557 n. 1 (1954); *Rescue Army v. Municipal Court*, 331 U.S. 549, 565-568 (1947); *Bandini Petroleum Co. v. Superior Court*, 284 U.S. 8, 14-15 (1931); and one additional case with a "see" signal, *Costarelli v. Massachusetts*, 421 U.S. 193, 197-199 (1975), which is actually consistent with Mrs. Daniel's argument herein, *id.*, at 196. *Mt. Vernon* cites an 1829 opinion by Chief Justice Marshall, *Weston v. Charleston*, 27 U.S. (2 Pet.) 449, 464-65 (1829). These cases involved challenges to the subject matter jurisdiction of the lower court, not *in personam* jurisdiction. The denial of prohibition finally ended the matter, because there were no further factual inquiries to be addressed by the lower court after prohibition was denied.

640, 642 (Ala. 1994). There, Supreme Court of Alabama Associate Justice Gorman Houston noted that, on the bare record of a mandamus proceeding, it is difficult for a reviewing court to say that a trial court "clearly erred in denying [a] motion to dismiss or that [a defendant] has a clear and undisputable right to be dismissed from this action." *Id.*, quoted at App. A to Petition, p. 18a.

The non-finality of the denial of mandamus is compounded by the non-finality of a denial of a Rule 12(b)(2) motion to dismiss. Again, the Supreme Court of Alabama made this very point: "After such a denial, the continuation of personal jurisdiction over a defendant who appropriately persists in challenging it in the defendant's answer to the complaint and by motion for summary judgment or at trial depends on the introduction of substantial evidence to prove the plaintiff's jurisdictional allegations in the plaintiff's complaint." (App. A to Petition, p. 4a; citations omitted.) Petitioners thus seek review of a non-final judgment from the Supreme Court of Alabama refusing to set aside a non-final order of the Circuit Court of Baldwin County, Alabama.

As this Court stated in *Jefferson v. City of Tarrant, Alabama, supra*:

> This provision [§ 1257(a)] establishes a firm final judgment rule. To be reviewable by this Court, a state-court judgment must be final "in two senses: it must be subject to no further review or correction in any other state tribunal; it must also be final as an effective determination of the litigation and not of merely interlocutory or intermediate steps therein. It must be the final word of a final court." *Market Street R. Co. v. Railroad Comm'n of Cal.*, 324 U.S. 548, 551 (1945). As we have recognized, the finality rule "is not one of those technicalities to be easily scorned. It is an important factor in the smooth working of our federal system." *Radio Station WOW, Inc. v. Johnson*, 326 U.S. 120, 124 (1945).

Jefferson, 522 U.S. at 81. If the courts of Alabama continue to assert personal jurisdiction over Petitioners, if a final judgment on the merits is rendered against them and affirmed on appeal, and "[e]ven if the Supreme Court of Alabama adheres to its interlocutory ruling as 'law of the case,' that determination will in no way limit [this Court's] ability to review the issue on final judgment." *Id.* at 83.

The inconvenience to Petitioners of renewing their objections to the exercise of jurisdiction over them provides no reason to ignore the mandate of Congress in 28 U.S.C. § 1257(a) or the principles of comity and federalism that support Congress' decision to grant this Court jurisdiction to review state court judgments *only* after they become final. Denial of interlocutory review *necessarily* requires an allegedly aggrieved party to continue litigating the question, so it is no answer for Petitioners to complain that they would prefer to terminate this litigation against them sooner rather than later. Quite plainly, Petitioners do not "enjoy a right not to stand trial . . . entailed in the mere assertion that the District Court lacks personal jurisdiction." *Van Cauwenberghe v. Biard*, 486 U.S. 517, 526-27 (1988). As this Court has stated:

> In the context of due process restrictions on the exercise of personal jurisdiction, this Court has recognized that the individual interest protected is in "not being subject to the binding judgments of a forum with which [the defendant] has established no meaningful 'contacts, ties, or relations.' " . . . Because the right not to be subject to a binding judgment may be effectively vindicated following final judgment, we have held that the denial of a claim of lack of jurisdiction is not an immediately appealable collateral order.

Id. (brackets in original; citations omitted).[6] This principle applies with great force to the present matter.

Mt. Vernon-Woodberry and its progeny, including *Fisher*, are further distinguishable. Both cases, as well as those cited in footnote 7 of *Fisher*, involved petitions for a writ of prohibition raising *facial challenges* to the exercise of *subject matter* jurisdiction by inferior courts. In *Mt. Vernon-Woodberry*, for example, the Court began its discussion by saying that "Prohibition is a distinct suit and the judgment finally disposing of it is a final judgment within the meaning of the Judicial Code." 240 U.S. at 31. A denial of prohibition where the reviewing court finally decides the question of whether an inferior court has subject-matter jurisdiction under a statute is entirely different, for purposes of finality analysis, from a denial of mandamus in which the reviewing court expressly states that the question presented remains open. The critical distinction lies in the *Mt. Vernon-Woodberry* Court's notation that a "judgment *finally* disposing of" a petition for prohibition is a final judgment. The Supreme Court of Alabama has expressly held that its denial of mandamus is not "final" in any meaningful sense, a decision on a matter of state procedure that this Court should not controvert.

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[6] See also *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286, 291 (1980):

> The Due Process Clause of the Fourteenth Amendment limits the power of a state court to render a valid personal *judgment* against a nonresident defendant. . . . A *judgment* rendered in violation of due process is void in the rendering State and is not entitled to full faith and credit elsewhere.

(Citations omitted; emphasis added.)

II. Even If This Court May Have Jurisdiction, It Should Decline To Exercise It

A. Even a Final Denial of An Extraordinary Writ Does Not Require This Court to Take Jurisdiction

Most of the *Fisher/Mt. Vernon-Woodberry* line of cases involved the appellate jurisdiction of the Supreme Court that was repealed in 1988. *See* former 28 U.S.C. § 1257, before amendment by Pub. L. 100-352, §§ 3 and 5, June 27, 1988, 102 Stat. 662, 664. Even under its former appellate jurisdiction, the Court exercised discretionary authority and declined to exercise jurisdiction in *Rescue Army, supra,* at n. 5, dismissing the appeal. The *Rescue Army* Court discussed the rule from *Bandini, supra,* at n. 5, and earlier cases that a denial of prohibition creates an appealable final judgment, but concluded that "[w]hile therefore we are unable to conclude that there is no jurisdiction in this cause, nevertheless compelling reasons exist for not exercising it." 331 U.S. 549, 565-67. The Court then discussed those "compelling reasons," beginning with the "policy of strict necessity in disposing of constitutional issues." *Id.* Significant in that discussion is footnote 34:

> "If there is one doctrine more deeply rooted than any other in the process of constitutional adjudication, it is that we ought not to pass on questions of constitutionality * * * unless such adjudication is unavoidable." . . . It has long been the Court's "considered practice not to decide abstract, hypothetical or contingent questions * * * or to decide any constitutional question in advance of the necessity for its decision. . . . "

Id. at 570 n. 34 (citations omitted). The Court concluded that "the shape in which the underlying constitutional issues have reached this Court presents, we think, insuperable obstacles to any exercise of jurisdiction to determine them, [including] obstacles of prematurity and comparative abstractness." *Id.* at 574. If these sorts of considerations persuaded the Court to decline to exercise *appellate*

jurisdiction in *Rescue Army*, they provide even more compelling persuasion that this Court should deny *certiorari* where the question is undeveloped, abstract, and premature.

The *Bandini* Court held that it had jurisdiction over an appeal from a denial of a writ of prohibition that "merely dealt with the jurisdiction of the Superior Court of the suit for injunction, and the only question before us is whether the District Court of Appeal erred in deciding the federal questions as to the validity of the statute upon which that jurisdiction was based. Moreover, *with all questions of fact* . . . we are not concerned on this appeal." *Bandini, supra*, 284 U.S. 8, 14 (emphasis added). *In personam* jurisdiction is necessarily dependent upon the facts of the defendants' contacts with the forum state, and this Court should "not [be] concerned" with such factual questions when the court below held only that the matters presented at a preliminary stage did not demonstrate unequivocally that Plaintiff could prove no facts supporting jurisdiction over Petitioners. Only after those facts have been finally litigated and a final judgment entered against Petitioners based on a factual finding that they are subject to the jurisdiction of Alabama would the question be ripe for this Court's review.

B. The Better View of the *In Personam* Cases is That This Court Should Grant Review Only After a Final Judgment Against the Objecting Defendant

This Court's landmark *in personam* decisions are discussed, *infra*, regarding their "minimum contacts" analyses. For present purposes, Mrs. Daniel points out that some of these cases arose after a denial of a motion to dismiss, a trial, and a final judgment against the objecting defendant, while other cases arose from pre-trial postures with no discussion of the Court's jurisdiction. The few cases where the Court has discussed its jurisdiction to

entertain appeals or certiorari petitions in preliminary postures are either distinguishable (as in *Shaffer v. Heitner*, *infra*) or based on questionable support (as in *Kulko*, *infra*).

In *Burger King Corp. v. Rudzewicz*, 471 U.S. 462 (1985), the *in personam* issue was brought to this Court after a final judgment. Burger King, a Florida corporation, brought suit in Florida against two individual Michigan franchisees, who entered special appearances and moved for dismissal. The district court denied their motions. *Id.*, at 469. They then filed an answer and counterclaim. After a three-day bench trial, the court again concluded that it had jurisdiction over the parties. *Id.* The trial court entered a final judgment against them and they appealed to the Eleventh Circuit. That court reversed, holding that the defendants did not have sufficient contacts with Florida to support the district court's exercise of jurisdiction over them. This Court reversed, holding that the defendants had established minimum contacts.

This Court also addressed *in personam* jurisdiction after a trial on the merits in *Helicopteros Nacionales De Columbia, S.A. v. Hall*, 466 U.S. 408 (1984). Four wrongful death actions were filed in a Texas state court against a Colombian corporation (Helicol) engaged in the business of providing helicopter transportation for oil and construction companies in South America. *Id.*, at 409. Helicol filed special appearances and moved to dismiss the actions for lack of *in personam* jurisdiction. The Texas court denied the motion, held a jury trial, and entered a final judgment on a verdict against Helicol. Helicol appealed to the Texas Court of Civil Appeals, which reversed for lack of *in personam* jurisdiction. The plaintiffs then appealed to the Supreme Court of Texas, which reversed, holding that the trial court had properly exercised jurisdiction. *Id.*, at 412. This Court reversed, holding that minimum contacts were not shown.

In *Asahi Metal Industry Company, Ltd. v. Superior Court*, 480 U.S. 102 (1987), the *in personam* issue reached this Court in a preliminary posture. After the trial court denied

a motion to quash summons on Asahi, a Japanese corporation, the intermediate appellate court "issued a peremptory writ of mandamus commanding the [trial court] to quash service of summons." *Id.* at 107. The California Supreme Court then reversed and discharged the writ issued by the intermediate appellate court. *Id.* at 108. This Court reached the merits with no discussion of whether there was a final judgment that would support jurisdiction under 28 U.S.C. § 1257.

In *Calder v. Jones*, 465 U.S. 783 (1984), two Florida defendants "caused special appearances to be entered [in California] on their behalf, moving to quash the service of process for lack of personal jurisdiction. The Superior Court granted the motion," *id.*, at 784-85, the California Court of Appeals reversed, *id.*, at 785, and the California Supreme Court denied a petition for hearing, *id.*, at 787. This Court, addressing the question of whether there was a final judgment, stated:

> Although there has not yet been a trial on the merits in this case, the judgment of the California appellate court "is plainly final on the federal issue and is not subject to further review in the state courts." *Cox Broadcasting Corp. v. Cohn*, 420 U.S. 469, 485 (1975). Accordingly, as in several past cases presenting jurisdictional issues in this posture, "we conclude that the judgment below is final within the meaning of [28 U.S.C.] § 1257." *Shaffer v. Heitner*, 433 U.S. 186, 195-196, n. 12 (1977). See also *Rush v. Savchuk*, 440 U.S. 320 (1980); *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286 (1980); *Kulko v. Superior Court*, 436 U.S. 84 (1978).

Calder v. Jones, 465 U.S. at 788, n. 8.[7] However, the quoted language from *Cox Broadcasting* cannot govern the present

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[7] The Court exercised jurisdiction in *Rush*, *World-Wide Volkswagen*, and *Kulko*, but did not engage in any discussion of how and why it had jurisdiction. See *Rush*, 444 U.S. at 324-25, and 433 U.S. 902 (1977), noting probable jurisdiction without further comment; *World-Wide*, 444 U.S. at 289-291; and *Kulko*,

case, because the Supreme Court of Alabama expressly held that its judgment is *not* final on the federal issue and *is* subject to further review in the state courts.

In *Cox Broadcasting Corp. v. Cohn*, 420 U.S. 469, 485-86 (1975), a Georgia trial court granted summary judgment for the plaintiff on liability in his invasion of privacy action and ordered a trial on damages. The defendants claimed that their broadcasts were privileged under the First and Fourteenth Amendments. *Id.*, at 474. The Georgia Supreme Court affirmed the interlocutory liability judgment, holding that a Georgia statute making it unlawful to disseminate the name of a rape victim was constitutional as against the defendant's invocation of the First Amendment. *Id.*, at 475. This Court addressed the question of jurisdiction, sorting its prior decisions into "four categories of . . . cases in which the Court has treated the decision on the federal issue as a final judgment" even though there "are further proceedings in the lower state courts to come." *Id.*, at 477. The first category applies where "the federal issue is conclusive or the outcome of further proceedings preordained." *Id.*, at 478. There is nothing "conclusive or . . . preordained" about further state court proceedings in the present matter. To the contrary, Petitioners can point only to a tentative refusal to set aside a preliminary denial of a weakly supported assertion of a lack of minimum contacts.

The second *Cox Broadcasting* category comprises cases "in which the federal issue, *finally decided* by the highest court in the State, will survive and require a decision regardless of the outcome of future state-court proceedings." *Id.*, at 480 (emphasis added). There is nothing "finally decided by" the Supreme Court of Alabama, and the federal issue may very well not survive for any

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436 U.S. at 90, finding no jurisdiction by appeal, but treating the papers as a petition for certiorari pursuant to *Hanson v. Denckla* and *May v. Anderson, infra*, and explaining in footnote 4 why appellate jurisdiction does not lie but not explaining why certiorari jurisdiction does lie.

number of reasons. For example, after discovery, Petitioners' contacts with Alabama may prove overwhelming, and they may concede jurisdiction. Alternatively, if their contacts prove to be no more than they have admitted in their affidavits, and their commercial activities prove not to have resulted in colorable contacts with Alabama in the sale and marketing of fix a flat, the state trial court remains free to hold that contacts have not been established as a factual matter. Moreover, just as in *Jefferson v. City of Tarrant, supra,* "[r]esolution of the state-law claims could effectively moot the federal-law question raised here." 522 U.S. 75, at 82.

The third category includes cases "where the federal claim has been *finally decided,* with further proceedings on the merits in the state courts to come, but in which later review of the federal issue cannot be had, whatever the ultimate outcome of the case." *Id.,* at 481 (emphasis added). This category is not implicated here because, as stated in *Van Cauwenberghe, supra,* Petitioners have no right to avoid a trial, and as can be seen from *Burger King* and *Helicopteros, supra,* they can raise their due process argument after a trial.

Cox Broadcasting described the fourth category as follows:

> Lastly, there are those situations where the *federal issue has been finally decided* in the state courts with further proceedings pending in which the party seeking review here might prevail on the merits on non-federal grounds, thus rendering unnecessary review of the federal issue by this Court, and where reversal of the state court on the federal issue would be preclusive of any further litigation on the relevant cause of action rather than merely controlling the nature and character of, or determining the admissibility of evidence in, the state proceedings still to come. In these circumstances, if a refusal to immediately review the state court decision might seriously erode federal policy, the Court has entertained and decided *the federal*

> *issue, which itself has been finally determined* by the state courts for purposes of the state litigation.

Id., at 482-83 (emphasis added). Again, the issue has not been "finally determined." Moreover, requiring Petitioners to continue defending these claims against them, conditioned upon substantiation of the allegations contained in the Amended Complaint, can hardly be said to "seriously erode federal policy."

Shaffer v. Heitner, 433 U.S. 186, 195-96, n. 12 (1977), cited the *Cox Broadcasting* analysis in the context of a jurisdictional challenge arising before trial. The circumstances of *Shaffer*, however, differ greatly from those here. The Delaware law at issue in *Shaffer* required defendants to "enter a general appearance, thus subjecting themselves to *in personam* liability, before they [could] defend on the merits." *Id.* Quite the contrary is true here. Even if, after further proceedings in the trial court, the trial court continues to assert jurisdiction over Petitioners, they will still be able to raise their due process argument in any appeal from a judgment against them on the merits. *Shaffer* quoted *Cox Broadcasting* as follows:

> "The (Delaware) Supreme Court's judgment is *plainly final on the federal issue* and is *not subject to further review in the state courts*. Appellants will be liable for damages if the elements of the state cause of action are proved. They may prevail at trial on non-federal grounds, it is true, but *if the (Delaware) court erroneously upheld the statute, there should be no trial at all.*"

Id. (alteration in *Shaffer*; citation omitted; emphasis added). A *facial challenge* to a statute is not fact-dependent and its rejection on appeal finally resolves the question. Those factors provide this Court's jurisdiction, not the exhortation that "there should be no trial at all." The present case, unlike *Shaffer*, involves only a non-final rejection of a threshold claim that a *factual showing* cannot be made.

Moreover, the rule of *Van Cauwenberghe, supra*, that the Fourteenth Amendment protects against a *final judgment* without due process, not against an erroneous holding of a

trial, further distinguishes this case from *Shaffer* and *Cox Broadcasting*. Petitioners cannot be heard at this stage to say that "there should be no trial at all," because the Supreme Court of Alabama has expressly preserved their right to renew and substantiate their challenge to the jurisdiction of the Alabama courts over them. Little or no judicial economy could be gained by addressing Petitioners' arguments now, because a holding in their favor would not avoid the need for a trial. There will be a trial in any event against at least the remaining defendants. If this Petition is denied, if the state trial court holds a trial and enters a judgment against all the defendants, if Petitioners appeal from that judgment, and if the Supreme Court of Alabama holds that the trial court erred in continuing to exercise jurisdiction over them, a reversal of the judgment against Petitioners would not require a reversal of the judgment against the other defendants. Thus, an erroneous assertion of jurisdiction over Petitioners through a trial on the merits would not require a retrial as to other defendants. In short, as the Court said in *Jefferson v. Tarrant City*, *supra*, Petitioners have simply come here "too soon." 522 U.S. at 77.

Hanson v. Denckla, 357 U.S. 235 (1958), did not present any question of finality. The procedural holding that was alluded to in *Kulko*, *supra*, at n. 7, was stated in the following paragraph:

> The question of our jurisdiction was postponed until the hearing of the merits. The appeal is predicated upon the contention that as applied to the facts of this case the Florida statute providing for constructive service is contrary to the Federal Constitution. 28 U.S.C. § 1257(2). But in the state court appellants (the "beneficiaries") did not object that the statute was invalid as applied, but rather that the effect of the state court's exercise of jurisdiction in the circumstances of this case deprived them of a right under the Federal Constitution. Accordingly, we are without jurisdiction of the appeal and it must be dismissed. . . . Treating the papers whereon appeal was

> taken as a petition for certiorari, 28 U.S.C. § 2103, certiorari is granted.

357 U.S. at 244 (footnote and citations omitted). Thus, the only issue depended on differences between appellate jurisdiction and certiorari jurisdiction and the *Hanson* Court in no way implied that certiorari will lie to review a non-final ruling from a state court. The Florida decree at issue in *Hanson* declared that the beneficiaries took the disputed property under the will; the Delaware decree declared that the appointees under the power of appointment in the trust took the property. There is no indication that either decree suffered any lack of finality. The only question was whether the Florida decree was void for lack of *in rem* jurisdiction over the corpus of the Delaware trust or *in personam* jurisdiction over the Delaware trustee. Thus, the citation to *Hanson* in *Kulko*, 436 U.S. 84, at 90, n. 4, does not support the exercise of jurisdiction in *Kulko* over a non-final judgment.

Nor does *May v. Anderson*, 345 U.S. 528 (1953), involve any question as to finality of the judgment below. An Ohio probate court, "proceeding to the merits of the case ," *id.*, at 529, granted a father's petition for a writ of habeas corpus and ordered the mother to give up custody of the couple's children, rejecting the mother's argument that the *ex parte* Wisconsin divorce decree obtained by the father was void for lack of *in personam* jurisdiction over her. The intermediate appellate court of Ohio affirmed, and the Supreme Court of Ohio denied review. *Id.*, at 529-530. As in *Hanson*, the Court "treated the appeal as a petition for a writ of certiorari." *Id.*, at 530. The attempt to invoke appellate jurisdiction was based on an Ohio statute upon which "neither the Court of Appeals nor the Supreme Court of Ohio relied." *Id.* This again provides no support for the apparent conclusion in *Kulko* that certiorari jurisdiction will lie to review a non-final judgment even though appellate jurisdiction will not lie.

Close study of the pertinent cases along the lines suggested above supports at least a prudential decision not to entertain certiorari in this case. Thus, even if this

Court disagrees with the argument in Part I above that the opinion below is not final so as to support review, the fact that in a number of these cases the issue came up only after a trial on the merits suggests that this Court should decline to exercise jurisdiction. The correctness of that conclusion will be even more evident after the Court considers the arguments in the following section of this brief.

III. Petitioners Make No Showing Of A Due Process Violation

Even if the foregoing jurisdictional and prudential concerns did not exist, there would be no issue here worthy of issuing a writ of certiorari. The decision of the Supreme Court of Alabama is consistent with this Court's precedents, and there is no need for this Court to engage in academic, abstract rumination about potential tests for "arising out of" or "related to," as the Petition asks the Court to do.

The posture of this matter affects its merits as well as the Court's jurisdiction. There was no evidentiary hearing; the circuit judge simply heard oral arguments of counsel on this motion and others at a motion docket. Petitioners and Borka had recently submitted affidavits that did little more than deny frequent physical presence in Alabama, and Plaintiff had not conducted discovery on this question prior to the hearing. The trial court denied the motions to dismiss, apparently agreeing with Plaintiff's position that the affidavits insufficiently denied contacts with Alabama and that the uncontradicted allegations of the Complaint were sufficient to support the exercise of personal jurisdiction, at least in the posture then presented.

The Supreme Court of Alabama agreed, applying the following standard of review:

> In considering a Rule 12(b)(2), Ala.R.Civ.P., motion to dismiss for want of personal jurisdiction, a court must consider as true the allegations of the plaintiff's complaint not controverted by the defendant's affidavits, *Robinson v. Giamarco & Bill, P.C.*, 74 F.3d 253 (11th Cir. 1996), and *Cable/*

> *Home Communication Corp. v. Network Productions, Inc.*, 902 F.2d 829 (11th Cir. 1990), and "where the plaintiff's complaint and the defendant's affidavits conflict, the court must construe all reasonable inferences in favor of the plaintiff." *Robinson*, 74 F.3d at 255 (quoting *Madara v. Hall*, 916 F.2d 1510, 1514 (11th Cir. 1990). "For purposes of this appeal [on the issue of *in personam* jurisdiction] the facts as alleged by the . . . plaintiff will be considered in a light most favorable to him [or her]." *Duke v. Young*, 496 So.2d 37, 38 (Ala. 1986).

(App. A to Petition, p. 3a.) Thus, the question becomes whether Petitioners can show constitutional error despite the "allegations of the plaintiff's complaint not controverted by the defendants' affidavits, . . . construe all reasonable inferences in favor of the plaintiff." *Id.*

Burger King Corp. v. Rudzewicz, supra, provides ample support for the conclusion that *in personam* jurisdiction exists here. The following paragraph from *Burger King* is especially pertinent:

> We have noted several reasons why a forum legitimately may exercise personal jurisdiction over a nonresident who "purposefully directs" his activities toward forum residents. A State generally has a "manifest interest" in providing its residents with a convenient forum for redressing injuries inflicted by out-of-state actors. . . . Moreover, where individuals "purposefully derive benefit" from their interstate activities, . . . it may well be unfair to allow them to escape having to account in other States for consequences that arise proximately from such activities; the Due Process Clause may not readily be wielded as a territorial shield to avoid interstate obligations that have been voluntarily assumed. And because "modern transportation and communications have made it much less burdensome for a party sued to defend himself in a State

> where he engages in economic activity," it usually will not be unfair to subject him to the burdens of litigating in another forum for disputes relating to such activity.

471 U.S. at 473-74 (citations omitted). Given the uncontested allegations of the Amended Complaint in this case, the foregoing passage from *Burger King* provides more than enough authority for a finding that the Supreme Court of Alabama was absolutely correct to deny Petitioners' writ of mandamus.

But there is more support in *Burger King* for the Supreme Court of Alabama's decision. There the Court held that the reasonableness of jurisdiction may be established "upon a lesser showing of minimum contacts than would otherwise be required":

> Thus courts in "appropriate case[s]" may evaluate "the burden on the defendant," "the forum State's interest in adjudicating the dispute," "the plaintiff's interest in obtaining convenient and effective relief," "the interstate judicial system's interest in obtaining the most efficient resolution of controversies," and the "shared interest of the several States in furthering fundamental substantive social policies." . . . These considerations sometimes serve to establish the reasonableness of jurisdiction upon a lesser showing of minimum contacts than would otherwise be required.

Burger King, 471 U.S. at 476-77 (citations omitted). These principles refute Petitioners' argument that the Supreme Court of Alabama erred in considering the reprehensibility of their alleged conduct in determining whether "a lesser showing of minimum contacts than would otherwise be required" properly supported the Alabama court's assertion of *in personam* jurisdiction over them. Alabama has an interest in adjudicating the dispute as a means of protecting its citizens against a defendant from a nearby state whose highly culpable wrongdoing has caused death in Alabama. "The interstate judicial system's interest in obtaining the most efficient resolution of controversies," *id.*, applies because Alabama has jurisdiction over

numerous other joint tortfeasors. These interests "establish the reasonableness of jurisdiction upon a lesser showing of minimum contacts than would otherwise be required." *Id.* The Supreme Court of Alabama has therefore properly relied on the principles established by this Court, and Petitioners' assertion that "the Supreme Court of Alabama has taken an extreme position" (Petition, p. 1) is simply wrong.

In *Burger King*, this Court upheld the district court's assertion of jurisdiction over defendants Rudzewicz and MacShara despite their having few or no physical ties to Florida. Noting that MacShara had been there for a single brief training course, but "for all that appears from the record, [Rudzewicz] has never even visited there," *id.*, at 479, the Court rejected the Eleventh Circuit's categorical holding that MacShara's trip to Florida on Burger King business could not be attributed to Rudzewicz:

> We have previously noted that when commercial activities are "carried on in behalf of" an out-of-state party those activities may sometimes be ascribed to the party, . . . at least where he is a 'primary participan[t]' in the enterprise and has acted purposefully in directing those activities. . . . Because MacShara's matriculation at Burger King University is not pivotal to the disposition of this case, we need not resolve the permissible bounds of such attribution.

Id., at 480 n. 22 (citations omitted). Here, McInnis was Vice President of Sales, and Shingleton was Regional Director of Sales. Shingleton's four trips to Alabama to sell Snap products could thus arguably be attributed to McInnis. However, because physical presence in Alabama is not required to hold these two perpetrators liable for their acts directed toward Alabama, the Court "need not resolve the permissible bounds of such attribution." It suffices that the Complaint and Petitioners' affidavits permit an inference that they directed sales efforts toward Alabama, that the fix a flat that killed Mr. Daniel was sold in Alabama, and that the sale was related to Defendants' sales efforts. It follows that the Supreme Court of Alabama was quite

correct to conclude that the assertion of *in personam* jurisdiction over McInnis and Shingleton was proper.[8]

Calder v. Jones, 465 U.S. 783 (1984), also supports the Supreme Court of Alabama's decision, as it affirmed assertions of jurisdiction in California over an editor and a reporter of the *National Enquirer* who were residents of Florida. Shirley Jones sued them and the *Enquirer* in California, alleging they had libeled her. Petitioner South, the reporter, traveled to California frequently, but denied by affidavit that he visited California to research the relevant article. *Id.*, at 785, n. 4. The Court expressly did not rely for its holding on the alleged visit. *Id.* Petitioner Calder was also a Florida resident, but had been to California only twice – once on a pleasure trip before the publication of the article and once afterwards to testify in an unrelated matter. *Id.*, at 786. He had "no other relevant contacts with

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[8] The immateriality of Petitioners' affidavits is highlighted by the following holding from *Burger King*:

> Jurisdiction in these circumstances may not be avoided merely because the defendant did not *physically* enter the forum State. . . . [I]t is an inescapable fact of modern commercial life that a substantial amount of business is transacted solely by mail and wire communications across state lines, thus obviating the need for physical presence within a State in which business is conducted. So long as a commercial actor's efforts are "purposefully directed" toward residents of another State, we have consistently rejected the notion that an absence of physical contacts can defeat personal jurisdiction there.

Burger King, 471 U.S. at 476 (citations omitted; emphasis in original). As "commercial actor[s]," *id.*, Petitioners' efforts to market their most profitable product to the residents of numerous states, including Alabama, surely amount to purposeful availment sufficient to confer personal jurisdiction on Alabama courts.

California." *Id.* The California Court of Appeal nonetheless:

> concluded that a valid basis for jurisdiction existed on the theory that petitioners intended to, and did, cause tortious injury to respondent in California. The fact that the actions causing the effects in California were performed outside the State did not prevent the State from asserting jurisdiction over a cause of action arising out of those effects.

Id., at 787. This Court approved "of the 'effects' tests employed by the California court." *Id.*, at 787, n. 6. The fact that Petitioners' actions causing an effect in Alabama may have occurred outside Alabama do not prevent Alabama from asserting jurisdiction over a cause of action arising out of that effect.

In *Keeton v. Hustler Magazine, Inc.*, 465 U.S. 770 (1984), the Court held: "Respondent's regular circulation of magazines in the forum State is sufficient to support an assertion of jurisdiction in a libel action based on the contents of the magazine." *Id.*, at 773-74. The same is true of Snap and its principals, whose regular sales of fix a flat in Alabama suffice to support an assertion of jurisdiction in a wrongful death action based on the explosion of the contents of fix a flat, for "[r]egular monthly sales of thousands of [products] cannot by any stretch of the imagination be characterized as random, isolated, or fortuitous." *Id.*, at 774. It can be inferred from the allegation that fix a flat constituted fifty percent of the revenue of Snap that substantial numbers of sales occurred in Alabama at the relevant times. Petitioners, as the persons individually responsible for the creation and sale of this dangerous product, cannot be said to have established only "random, isolated, or fortuitous" contacts with Alabama.

In any event, "it is 'fair' to compel respondent to defend a multi-state lawsuit in New Hampshire seeking

nationwide damages for all copies of the five issues in question, even though *only a small portion of those copies were distributed in New Hampshire." Id.*, at 775. Thus, even if only a small percentage of the sales of fix a flat occurred in Alabama, *Keeton* supports a holding that efforts to promote those sales support the exercise of *in personam* jurisdiction over Petitioners. This holds true even if only part of their sales efforts were directed at Alabama: "But respondent is carrying on a 'part of its general business' in New Hampshire, and that is sufficient to support jurisdiction when the cause of action arises out of the very activity being conducted, in part, in New Hampshire." *Id.*, at 779-80. Petitioners have not denied making *any* efforts to sell fix a flat in Alabama; they have only denied *repeated trips* to Alabama that *directly* resulted in sales of fix a flat in Alabama. (App. A to Petition, pp. 8a-10a.) By negative inference, it can be concluded that they made efforts directed toward customers in Alabama, even if only from their offices in North Carolina, which directly or indirectly resulted in sales in Alabama. Thus, the record supports a conclusion that Petitioners have conducted, in part, their tortious activity in, or at least directed toward, Alabama.

In footnote 13, the *Keeton* Court held that the inquiry would remain "open upon remand" as to whether "Larry Flynt, the publisher, editor and owner of the magazine," was subject to jurisdiction in New Hampshire. *Keeton*, 465 U.S. at 781, n. 13. Because the Court of Appeals found no jurisdiction over the corporation, "it did not inquire into the propriety of jurisdiction over" Flynt. *Id.* The allegations against Petitioners here of personal tortious involvement in knowingly directing this dangerous product at the national market and Alabama in particular help establish "the propriety of jurisdiction." *Id.*

CONCLUSION

Petitioners could have said to themselves, "we better not sell fix a flat in Alabama because if we kill someone there, we might get sued." They could have prevented Snap from marketing fix a flat in Alabama. Instead, Petitioners took affirmative action toward selling fix a flat in Alabama. They have admitted personal presence in Alabama to conduct sales efforts for the corporations for which they were sales executives and later chief executives. They have not denied conducting other sales efforts directed toward Alabama. This record would not support a conclusion by this Court that the trial court and the Supreme Court of Alabama manifestly erred in holding that McInnis and Shingleton had not shown an absence of sufficient contacts with Alabama. In any event, there is no final judgment presented for review, so this Court cannot, or at least should not, exercise jurisdiction over this Petition.

Respectfully submitted,

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April 5, 2002

APPENDIX A

IN THE CIRCUIT COURT OF BALDWIN COUNTY, ALABAMA

PAMELA ALICE LITTLE DANIEL, Administratrix of the Estate of JOE ED DANIEL, Deceased,

Plaintiff,

VS:

PANDORA MANUFACTURING, INC., formerly known as SNAP PRODUCTS, INC.; SNAP PRODUCTS, INC.; SNAP AUTOMOTIVE PRODUCTS, INC.; HUGHTONE INDUSTRIES, INC.; PAUL HUGHETT; MONTFORT A. JOHNSEN AND ASSOCIATES, LTD.; MONTFORT A. JOHNSEN; SAFETY CONSULTING ENGINEERS, INC.; JAMES C. DAHN; PENNZOIL QUAKER STATE COMPANY (f/k/a PENNZOIL PRODUCTS COMPANY); NATIONWIDE INDUSTRIES, INC.; SAM McINNIS; MICHAEL BORKA; TIM SHINGLETON; AEROFIL TECHNOLOGY, INC.; SWEAT TIRE COMPANY INCORPORATED; A, B, C, D, E and/or F, the person, firm or corporation who formulated, manufactured, sold, labeled,

CIVIL ACTION

AMENDED COMPLAINT

NO:CV-98-1113

(Filed Jun. 2, 1999)

packaged, supplied and/or distributed the Fix-A-Flat *Non-Explosive Formua* aerosol tire sealant/inflator involved in the accident made the basis of this suit; G, H, I, J, K and/or L, the person, firm or corporation who packaged the Fix-a-Flat *Non-Explosive Formula* aerosol tire sealant/inflator involved in the accident made the basis of this suit; M, N, O, P, Q and/or R, the person, firm or corporation who modified, converted and/or altered the tire and rim assembly involved in the accident made the basis of this suit: all of whose true names and legal identities are otherwise unknown to the Plaintiff at this time, but will be substituted by amendment when ascertained, individually and jointly,

Defendants.

GENERAL ALLEGATIONS

1. Plaintiff is a resident of the State of Alabama.

2. Defendant Nationwide Industries, Inc. is the corporate predecessor to defendant Snap Products, Inc. which is the corporate predecessor to defendant Pandora Manufacturing, Inc. These defendants are, or have been, residents of the state of North Carolina, with a principal place of business located as 4117 North Roxboro Road, Suite 201, Durham, North Carolina.

3. Defendant Pennzoil – Quaker State Company (f/k/a Pennzoil Products Company) is a resident of the state of Texas which owns, and is a corporate successor to, defendants Nationwide Industries, Inc.; Snap Products, Inc.; Snap Automotive Products, Inc.; and Pandora Manufacturing, Inc.

4. Defendants Sam McInnis ("McInnis"), Michael Borka ("Borka"), and Tim Shingleton ("Shingleton") were, at all times relevant hereto, residents of the state of North Carolina and were either employed in managerial capacities, or were owners and/or officers of defendants Nationwide Industries, Inc.; and/or Snap Products, Inc.; and/or Snap Automotive Products, Inc.; and/or Pandora Manufacturing, Inc. and in such capacities acted as agents for the companies.

5. Defendant Snap Automotive Products, Inc. is a Delaware corporation with its principal residence located in North Carolina.

6. Defendant Hughtone Industries, Inc. ("Hughtone") is a Florida corporation and defendant Paul Hughett ("Hughett") is an owner/officer of the company who at all relevant times acted as an agent for Hughtone.

7. Defendant Montfort A. Johnsen and Associates, Ltd. ("Johnsen & Assoc.") is an Illinois corporation and defendant Montfort A. Johnsen ("Johnsen") is an owner and/or officer of the company who at all relevant times acted as an agent for Johnsen & Assoc.

8. Defendant Safety Consulting Engineers, Inc. ("SCE") is an Illinois corporation and defendant James C.

Dahn ("Dahn") is an owner and/or officer and/or employee of SCE who at all relevant times acted as an agent for SCE.

9. Defendant Sweat Tire Company, Inc. is a resident of the state of Alabama.

10. Defendant Aerofil Technologies, Inc. is a resident of the state of Missouri and at all relevant times hereto filled, packaged, and/or distributed the **"fix a flat NON-EXPLOSIVE FORMULA"** tire inflator product.

11. At all times relevant hereto, defendants Pandora Manufacturing, Inc., formerly known as Snap Products, Inc.; Snap Products, Inc.; Snap Automotive Products, Inc.; Pennzoil – Quaker State Company; and Nationwide Industries, Inc. were engaged in the business of manufacturing and marketing an aerosol tire inflator product ("fix a flat") throughout the United States, including the state of Alabama.

12. Since at least 1979, up until 1993, defendant Nationwide Industries, Inc. ("Nationwide") marketed and sold the aerosol tire inflator product labeled "Snap fix a flat." In June 1993, Nationwide was sold and the name of the company was changed to Snap Products, Inc. ("Snap").

13. Defendant Sam McInnis ("McInnis") was first employed with Nationwide in March, 1990 and he continued with the company through the 1993 change to Snap Products, Inc.

14. Mr. McInnis became familiar with the "fix a flat" aerosol tire inflator product when he started with Nationwide in 1990 as sales manager. Mr. McInnis was put in

charge of everyday operations for Snap in the summer of 1994, and he and defendants Borka and Shingleton eventually bought the company in April 1995 by forming defendant Snap Automotive Products, Inc.

15. The "fix a flat" aerosol tire inflator product is, and has been, the single largest revenue generating product sold by Nationwide/Snap, and of approximately 70 company products, sales of the "fix a flat" product constitute approximately half the company's revenue.

16. As of 1990, when Mr. McInnis became director of marketing for Nationwide, the "fix a flat" aerosol tire inflator product was the major product Nationwide was marketing.

17. During the 1980s, Nationwide marketed the "Snap fix a flat" aerosol tire inflator product which then contained flammable propane/butane propellants. The propellant in a tire inflator serves to inflate the tire when the product is transferred into a tire. The sealant material in the tire inflator is intended to be transferred into a tire to plug a hole.

18. The propane/butane propelled "fix a flat" product (first generation product) was sold through 1989.

19. The first generation "fix a flat" tire inflator with the propane/butane propellants was implicated in numerous tire explosion accidents where claims were made that the flammable propellants from the product ignited when subjected to tire rim welding activity performed on a tire rim with a tire attached that contained the flammable gas from the "fix a flat" product.

20. Tire explosion accident claims also implicated the first generation "fix a flat" product in connection with tire plug repairs involving a tire reamer, or file, which created friction and/or sparks that ignited the flammable gas from the "fix a flat" product.

21. In response to the first generation "fix a flat" tire explosion accidents involving rim welding and tire reaming activity, Nationwide took action in 1989-1990 to (1) properly label the existing first generation propane/butane "fix a flat" product with graphic transferable warning labels advising the product user to transfer a warning sticker from the can to the tire to inform anyone coming in contact with the tire that it contained a flammable/explosive gas; (2) move toward designing out the flammable/explosive risk with a flammable propellant tire inflator product by developing a second generation non-flammable propellant hydrochlorofluorocarbon ("HCFC") product; and (3) disseminate safety bulletins nationwide to tire repair personnel to inform them of the flammable/explosive risks associated with flammable propellant aerosol tire inflator products.

22. The transferable tire explosion warning labels for the "fix a flat" product were utilized during the last year of the first generation product's marketing and sale in 1989.

23. The late first generation "fix a flat" product labeling advised the consumer that the product was "Extremely Flammable" and contained propane/butane explosive gases which could cause severe personal injury if tire reaming or rim welding occurred on tires or rims with the "fix a flat" product contained in the tires. The

warnings also stated the need to remove the tire from the rim, before performing any repairs, to avoid the explosion risks associated with the flammable tire inflator.

24. At the time Nationwide was first marketing its second generation HCFC non-flammable propellant "fix a flat" tire inflator product in the 1990-1991 time frame, the United States government was considering banning competitor flammable propellant tire inflator products, regardless of the warnings labeling on the products, because of tire explosion risks. Nationwide's position at that time was that the flammable propellant tire inflator products should be banned because the second generation "fix a flat" non-flammable HCFC propellant technology designed out the explosive risks normally associated with flammable propellant tire inflator products.

25. In 1990-1991 when the second generation "fix a flat" HCFC non-flammable propellant tire inflator product was first marketed, Mr. McInnis, as sales manager and "president" of Nationwide, used the non-flammability characteristics of the second generation "fix a flat" product as a competitive marketing advantage in differentiating the non-flammable second generation "fix a flat" product from the flammable propellant competitor tire inflator products.

26. As of 1991, Mr. McInnis became successful in convincing retail customers not to purchase the flammable propellant competitor tire inflator products that had graphic tire explosion warning stickers attached to the front of the cans.

27. On December 18, 1991, while Mr. McInnis was touting the safety aspects of the second generation non-

flammable HCFC propellant "fix a flat" product, Mr. McInnis tested a competitor tire inflator product manufactured by "STP." In testing the STP product, Mr. McInnis concluded that the STP product was flammable and was comparable to the propane/butane propellant tire inflator products.

28. On March 5, 1992, Nationwide and Mr. McInnis determined that the "STP" tire inflator product, which was labeled as a "non-explosive formula" product, utilized flammable/explosive dimethyl ether ("DME") as the propellant.

29. On March 5, 1992, Nationwide and Mr. McInnis acknowledged that DME is a highly flammable chemical that poses a dangerous fire and explosion hazard. Nationwide and Mr. McInnis also acknowledged that STP was compounding the explosion hazard associated with the STP DME tire inflator by labeling the product as a "non-explosive formula" because such labeling may lead some mechanics to disregard a need to remove the tire from the rim before performing repairs.

30. As of March 1992, Nationwide and Mr. McInnis understood that the "fix a flat" HCFC non-flammable second generation product was superior, with regard to safety, to the STP DME product as the "fix a flat" second generation product would not combust with any level of dilution with air inside a tire, unlike the STP DME product.

31. By at least 1992, the graphic and ostensible tire explosion transferable warning labels became the custom and standard in the aerosol tire inflator business for flammable propellant tire inflator products. The warnings

labeling existed because of the foreseeability that welding on a tire rim, with an attached tire containing a flammable gas tire inflator product, could ignite the flammable gas and cause a tire explosion.

32. As of 1992, Nationwide and Mr. McInnis understood that major retail customers preferred to purchase a non-flammable tire inflator product, as opposed to a flammable propellant product that could explode a tire.

33. As of 1993, Nationwide/Snap, and Mr. McInnis, felt very strongly about the safety aspects associated with the non-flammable HCFC second generation "fix a flat" product. In 1993, Nationwide/Snap and Mr. McInnis opined that manufacturers of flammable propellant tire inflators were irresponsible, and deceitful, regardless of warnings labeling utilized, and were sacrificing public safety in the interest of corporate profits by ignoring a serious public safety risk associated with flammable propellant tire inflator products.

34. In 1993, the United States government, under the Clean Air Act, Title 42 U.S.C. Section 7671i(d)(1)(A) notified Nationwide/Snap that the HCFC second generation "fix a flat" propellant was being phased out because it depleted the atmospheric ozone layer. The governmental order banning use of HCFC propellants for products such as tire inflators was to take effect at the end of 1993.

35. Because of the impending governmental ban on the second generation "fix a flat" HCFC non-flammable propellant, Nationwide/Snap, and Mr. McInnis, in July of 1993 evaluated potential propellants for a replacement

(third generation) "fix a flat" product to be sold starting in 1994.

36. In July of 1993, Mr. McInnis considered use of a propellant known as "134A" for the third generation "fix a flat" product which was to be sold starting in 1994. 134A is a non-flammable and non-explosive propellant which could be used in a tire inflator product. However, Mr. McInnis ruled out 134A for use in the upcoming third generation "fix a flat" tire inflator because of 134A's cost.

37. As of July 1993, Mr. McInnis advocated, and chose, use of DME for the upcoming third generation "fix a flat" product, to be sold starting in 1994, because DME was significantly less expensive than non-flammable 134A.

38. The third generation "fix a flat" tire inflator product, with the DME propellant, was first marketed and sold in early 1994. The product was labeled: **"NEW fix a flat NON-EXPLOSIVE FORMULA."** It was Mr. Mcinnis' decision to put the **"NON-EXPLOSIVE FORMULA"** label on the front of the third generation "fix a flat" DME product.

39. During 1990-1993, while Nationwide/Snap and Mr. McInnis were marketing their second generation HCFC non-flammable propellant "fix a flat" product, the company spent significant sums of money educating the public, and the tire inflator industry, as to the safety benefits of a non-flammable propellant tire inflator product in view of foreseeable rim welding and tire reaming activity.

40. Despite the fact that the third generation "fix a flat" product contained the flammable/explosive DME propellant, the product was labeled as a **"NON-EXPLOSIVE FORMULA"** because it was important for Snap's sales/marketing activities to continue projecting the product as "safe," "non-flammable," and "non-explosive" the same way the truly non-explosive second generation HCFC "fix a flat" had been marketed.

41. At the time the third generation "fix a flat" DME propellant tire inflator product was first marketed in early 1994, the STP DME tire inflator Nationwide/Snap previously tested in 1991 and 1992 (labeled as a "non-explosive formula") had been recalled from the market because of safety issues associated with tire explosion accidents.

42. On March 22, 1994, shortly after the third generation DME "fix a flat" product was first marketed, one of Snap's principal competitors, Radiator Specialty Company, ("RSC") communicated to Snap, and Mr. McInnis, that the third generation "fix a flat" DME product was explosive and was mislabeled as a **"NON-EXPLOSIVE FORMULA."**

43. On March 31, 1994, Mr. McInnis, at the invitation of RSC, visited RSC to meet with their representatives to discuss flammability/explosivity issues associated with the "fix a flat" DME product. At the meeting with RSC personnel on March 31, 1994, Mr. McInnis acknowledged to RSC that the DME "fix a flat" product was, in fact, explosive and may have to be recalled, which could cost millions of dollars, could cost Mr. McInnis his job, or could put Snap out of business.

44. Mr. McInnis also stated to RSC representatives on March 31, 1994, that Snap carried a $25,000,000 insurance policy covering the company for product liability risks.

45. On April 11, 1994, Mr. McInnis acknowledged to other Snap personnel that he agreed with the RSC findings that the DME "fix a flat" product was flammable and explosive. However, Mr. McInnis, also on April 11, 1994, had at least one attorney write to RSC threatening RSC with a lawsuit for allegedly falsely claiming that the "fix a flat" DME product was flammable/explosive.

46. In response to the RSC claims that the "fix a flat" DME product was mislabeled as a **"NON-EXPLOSIVE FORMULA,"** Mr. McInnis sought to have the product selectively tested. On April 21, 1994, an engineering firm known as "Dustech" evaluated the "fix a flat" product at Mr. McInnis' request and concluded that use of the DME propellant in the "fix a flat" product was conceptually similar to the use of propane regarding fire/explosion considerations. Dustech, through chemist William Cruice, confirmed that the third generation DME "fix a flat" **"NON-EXPLOSIVE FORMULA"** was, in fact, explosive and the test results were given to Mr. McInnis.

47. On or about April 25, 1994, Mr. McInnis, along with "consultlants" Montfort A. Johnsen ("Johnsen"), and Paul Hughett ("Hughett") attended a meeting in Kansas City, Missouri, with a customer (Western Auto Parts Company). Johnsen and Hughett had helped design and develop the third generation DME "fix a flat" product.

48. At the meeting with Western Auto on or about April 25, 1994, Mr. McInnis, with consultants Hughett

and Johnsen, tried to sell Western Auto the DME "fix a flat" product. However, Western Auto informed McInnis, Johnsen, and Hughett that Western Auto's testing of the "fix a flat" revealed that the product was flammable/explosive and Western Auto would not purchase such a product.

49. In response to Western Auto's concerns regarding the flammability/explosivity of the DME fix a flat product. Mr. McInnis informed Western Auto that if any accidents occurred involving the DME fix a flat product Snap would fully indemnify and reimburse Western Auto for any liability incurred under the provisions of Snap's $25,000,000 product liability insurance policy. Western Auto decided not to do any business with Snap.

50. On or about May 12, 1994, Snap and/or Mr. McInnis had tire explosion testing performed by defendants Hughtone, SCE, Hughett, and Dahn on the "fix a flat" DME product. On or about May 12, 1994, various mixtures of the "fix a flat" DME tire inflator product were inserted into Ford Explorer tire and rim assemblies to be ignited by a remote control spark plug igniter. This testing revealed that certain mixtures of the "fix a flat" DME product with air in a tire were explosive and could propel the Ford Explorer tire and rim assemblies as much as 252 feet into the air.

51. Despite test results by Hughtone and SCE in the spring of 1994 indicating the DME "fix a flat" product was explosive, Hughtone, SCE, Johnsen & Assoc., Hughett, Dahn, Johnsen, and Snap conspired to selectively omit tire explosion test sequences from testing reports which were sent to Snap's customers and the

Consumer Product Safety Commission. The selectively edited testing reports created the illusion that the "fix a flat" DME product was safe and non-explosive.

52. On October 5, 1994, Mr. McInnis hired a chemical engineer, Reese Howle, to perform additional remote control tire explosion tests on various mixtures of the "fix a flat" DME product with air inside tires. This testing was performed to simulate rim welding activity to determine whether mixtures of the "fix a flat" product with air inside a tire could explode tires.

53. On October 7, 1994, Reese Howle performed remote control tire explosion tests which confirmed that the "fix a flat" DME product could violently explode a tire. Mr. Howle then reported the test results to Mr. McInnis on this same day.

54. Despite Snap's knowledge of the explosive characteristics of the third generation DME "fix a flat" product, Snap and its "consultants" (Hughett, Johnsen, and Dahn) told concerned retail customers in 1994 that the "fix a flat" DME product had been thoroughly tested for safety, and that the product could not explode tires.

55. Because Snap utilized the less expensive DME propellant for the third generation "fix a flat" product (as opposed to the more costly 134A non-flammable propellant), and because Snap labeled their DME tire inflator as a **"NON-EXPLOSIVE FORMULA,"** Snap was able to enjoy a competitive cost marketing advantage over competitors who utilized the non-flammable 134a propellant.

56. In April 1995, defendants McInnis, Borka, and Shingleton formed Snap Automotive Products, Inc., and

purchased Snap Products, Inc. from the then owners of the company, the "Bishop Estate" in Hawaii.

57. At the time defendants McInnis, Borka, and Shingleton formed Snap Automotive Products, Inc., and bought Snap Products, Inc. from the "Bishop Estate," these defendants knew the DME "fix a flat" product was explosive and they had no intention to recall, or relabel, the product regarding flammability/explosivity risks.

58. On November 21, 1995, James Bergey-Lyon injected Snap's **"NEW fix a flat NON-EXPLOSIVE FORMULA"** tire inflator product into a partially deflated tubeless tire.

59. Subsequent to injecting the Snap **"fix a flat NON-EXPLOSIVE FORMULA"** tire inflator product into a partially deflated tire, Mr. Lyon was misled by Snap's label of non-explosiveness to believe that he did not need to remove the tire from the rim before he welded on the rim.

60. On November 21, 1995, James Bergey-Lyon was seriously injured in a tire explosion accident resulting from welding activity on a tire rim which ignited the DME flammable gas from the **"NEW fix a flat NON-EXPLOSIVE FORMULA"** product.

61. Snap, McInnis, Shingleton, and Borka subsequently learned of Mr. Lyon's accident in the spring or summer of 1996, but chose not to relabel or recall the "fix a flat" product labeled as containing a **"NON-EXPLOSIVE FORMULA."** These defendants also received information from Mr. Lyon's expert witness' reports further

confirming that the "fix a flat" DME product was explosive and mislabeled.

62. On April 12, 1996, a second injurious rim-welding tire explosion accident occurred in Arizona involving an individual named Mark Malinkovich when Mr. Malinkovich was misled by the "NON-EXPLOSIVE" label on the "fix a flat" DME tire inflator product and his welding activity ignited the explosive propellant.

63. After learning of the additional tire explosion accident in Arizona, Snap and its principals, McInnis, Borka, and Shingleton, chose not to recall or relabel the third generation "fix a flat" DME product labeled as a "NON-EXPLOSIVE FORMULA."

64. On October 1, 1996, an individual named Gary Olson sustained serious injuries in a rim welding tire explosion accident in Sandstone, Minnesota, when he welded on a tire rim with a tire attached that contained a flammable mixture of Snap's **"fix a flat" NON-EXPLOSIVE FORMULA"** DME tire inflator product.

65. At the time of Mr. Olson's accident on October 1, 1996, Mr. Olson was misled by defendants' labeling of the "fix a flat" product into believing that he did not otherwise need to remove the tire from the rim before commencing rim welding activity.

66. As a result of learning of Mr. Olson's accident, defendants Snap, McInnis, Borka, and Shingleton made no effort to recall the dangerous DME "fix a flat," or to place any information on the product that it contained an explosive gas.

67. On or about June 4, 1997, Joe Ed Daniel, attempted to affix a small metal block, or lug, to a motor grader rim with a tire attached which had been previously inflated with two cans of the DME **"fix a flat NON-EXPLOSIVE FORMULA"** tire inflator product.

68. Mr. Daniel, while performing a brief tacking repair to affix the metal block to the motor grader tire rim, was killed when the flammable DME propellant from the "fix a flat" product ignited and propelled the tire and/or components of the rim assembly into him thereby resulting in his being decapitated.

69. Mr. Daniel, and the individuals who previously purchased and injected the **"fix a flat NON-EXPLOSIVE FORMULA"** tire inflator product into the subject motor grader tire, were disarmed by the product's labeling into believing the motor grader tire did not have to be removed from the rim before the tacking procedure was performed.

70. Less than two weeks prior to Mr. Daniel's accident, the subject motor grader tire had been converted from a "tube type" tire to a "tubeless" tire by defendant Sweat Tire Company, Inc.

71. In November 1997, McInnis, Shingleton, and Borka sold Snap Products, Inc. to Pennzoil Products Company, n.k.a. Pennzoil – Quaker State Company.

72. In February 1999, Pennzoil – Quaker State Company announced a $25,000,000 nationwide recall of the explosive DME "fix a flat" product and reformulated the product by using the non-flammable 134A propellant instead of explosive DME.

FIRST CAUSE OF ACTION

Plaintiff, PAMELA ALICE LITTLE DANIEL, Administratrix of the Estate of JOE ED DANIEL, Deceased, alleges against the Defendants PANDORA MANUFACTURING, INC., formerly known as SNAP PRODUCTS, INC.; SNAP PRODUCTS, INC.; SNAP AUTOMOTIVE PRODUCTS, INC.; HUGHTONE INDUSTRIES, INC.; PAUL HUGHETT; MONTFORT A. JOHNSEN AND ASSOCIATES, LTD.; MONTFORT A. JOHNSEN; SAFETY CONSULTING ENGINEERS, INC.; JAMES C. DAHN; PENNZOIL – QUAKER STATE COMPANY (f/k/a PENNZOIL PRODUCTS COMPANY); NATIONWIDE INDUSTRIES, INC.; SAM McINNIS; MICHAEL BORKA; TIM SHINGLETON; AEROFIL TECHNOLOGY, INC.; SWEAT TIRE COMPANY INCORPORATED; A, B, C, D, E, F, G, H, I, J, K, L, M, N, O, P, Q, and R, as follows:

73. Plaintiff realleges all of the allegations contained in paragraphs 1 through 72 of the GENERAL ALLEGATIONS as if set forth fully herein.

74. This action is brought pursuant to the Alabama Extended Manufacturers Liability Doctrine.

75. The **"fix a flat NON-EXPLOSIVE FORMULA"** part number S455K, DOT 2Q involved in the accident made the basis of this suit was formulated, manufactured, labeled, packaged, sold, supplied and/or distributed by the Defendants, PANDORA MANUFACTURING, INC., formerly known as SNAP PRODUCTS, INC.; SNAP PRODUCTS, INC.; SNAP AUTOMOTIVE PRODUCTS, INC.; HUGHTONE INDUSTRIES, INC.; PAUL

HUGHETT; MONTFORT A. JOHNSEN AND ASSOCIATES, LTD.; MONTFORT A. JOHNSEN; SAFETY CONSULTING ENGINEERS, INC.; JAMES C. DAHN; PENNZOIL – QUAKER STATE COMPANY (f/k/a PENNZOIL PRODUCTS COMPANY); NATIONWIDE INDUSTRIES, INC.; SAM McINNIS; MICHAEL BORKA; TIM SHINGLETON; AEROFIL TECHNOLOGY, INC.; SWEAT TIRE COMPANY INCORPORATED; A, B, C, D, E, F, G, H, I, J, K, L, M, N, O, P, Q, and R.

76. Prior to June 4, 1997, the Defendants PANDORA MANUFACTURING, INC., formerly known as SNAP PRODUCTS, INC.; SNAP PRODUCTS, INC.; SNAP AUTOMOTIVE PRODUCTS, INC.; HUGHTONE INDUSTRIES, INC.; PAUL HUGHETT; MONTFORT A. JOHNSEN AND ASSOCIATES, LTD.; MONTFORT A. JOHNSEN; SAFETY CONSULTING ENGINEERS, INC.; JAMES C. DAHN; PENNZOIL – QUAKER STATE COMPANY (f/k/a PENNZOIL PRODUCTS COMPANY); NATIONWIDE INDUSTRIES, INC.; SAM McINNIS; MICHAEL BORKA; TIM SHINGLETON; AEROFIL TECHNOLOGY, INC.; SWEAT TIRE COMPANY INCORPORATED; A, B, C, D, E, F, G, H, I, J, K, L, M, N, O, P, Q, and R, either formulated, manufactured, labeled, packaged, sold, supplied and/or distributed the **"fix a flat NON-EXPLOSIVE FORMULA"** tire inflator/sealant involved in the accident made the basis of this suit.

77. At the time of the accident made the basis of this suit, the **"fix a flat NON-EXPLOSIVE FORMULA"** tire inflator/sealant was in substantially the same condition as it was when it originally left the control of the Defendants, PANDORA MANUFACTURING, INC., formerly known as SNAP PRODUCTS, INC.; SNAP PRODUCTS,

INC.; SNAP AUTOMOTIVE PRODUCTS, INC.; HUGHTONE INDUSTRIES, INC.; PAUL HUGHETT; MONTFORT A. JOHNSEN AND ASSOCIATES, LTD.; MONTFORT A. JOHNSEN; SAFETY CONSULTING ENGINEERS, INC.; JAMES C. DAHN; PENNZOIL – QUAKER STATE COMPANY (f/k/a PENNZOIL PRODUCTS COMPANY); NATIONWIDE INDUSTRIES, INC.; SAM McINNIS; MICHAEL BORKA; TIM SHINGLETON; AEROFIL TECHNOLOGY, INC.; SWEAT TIRE COMPANY INCORPORATED; A, B, C, D, E, F, G, H, I, J, K, L, M, N, O, P, Q, and R.

78. At the time the **"fix a flat NON-EXPLOSIVE FORMULA"** involved in the accident made the basis of this suit was formulated, manufactured, labeled, packaged, sold, supplied and/or distributed, it was in a defective and unreasonably dangerous condition and was not reasonably safe for its intended uses.

79. The injuries and subsequent death of Joe Ed Daniel were the direct and proximate result of the defective condition of the **"fix a flat NON-EXPLOSIVE FORMULA"** tire inflator/sealant.

WHEREFORE, Plaintiff PAMELA ALICE LITTLE DANIEL, Administratrix of the Estate of JOE ED DANIEL, Deceased, demands judgment against the Defendants PANDORA MANUFACTURING, INC., formerly known as SNAP PRODUCTS, INC.; SNAP PRODUCTS, INC.; SNAP AUTOMOTIVE PRODUCTS, INC.; HUGHTONE INDUSTRIES, INC.; PAUL HUGHETT; MONTFORT A. JOHNSEN AND ASSOCIATES, LTD.; MONTFORT A. JOHNSEN; SAFETY CONSULTING ENGINEERS, INC.; JAMES C. DAHN; PENNZOIL –

QUAKER STATE COMPANY (f/k/a PENNZOIL PRODUCTS COMPANY); NATIONWIDE INDUSTRIES, INC.; SAM McINNIS; MICHAEL BORKA; TIM SHINGLETON; AEROFIL TECHNOLOGY, INC.; SWEAT TIRE COMPANY INCORPORATED; A, B, C, D, E, F, G, H, I, J, K, L, M, N, O, P, Q, and R, separately and severally, for punitive damages, for the wrongful death of the said Joe Ed Daniel, plus interest and costs in excess of the jurisdictional limits of this Court.

SECOND CAUSE OF ACTION

PAMELA ALICE LITTLE DANIEL, Administratrix of the Estate of JOE ED DANIEL, Deceased, alleges against the Defendants PANDORA MANUFACTURING, INC., formerly known as SNAP PRODUCTS, INC.; SNAP PRODUCTS, INC.; SNAP AUTOMOTIVE PRODUCTS, INC.; HUGHTONE INDUSTRIES, INC.; PAUL HUGHETT; MONTFORT A. JOHNSEN AND ASSOCIATES, LTD.; MONTFORT A. JOHNSEN; SAFETY CONSULTING ENGINEERS, INC.; JAMES C. DAHN; PENNZOIL – QUAKER STATE COMPANY (f/k/a PENNZOIL PRODUCTS COMPANY); NATIONWIDE INDUSTRIES, INC.; SAM McINNIS; MICHAEL BORKA; TIM SHINGLETON; AEROFIL TECHNOLOGY, INC.; SWEAT TIRE COMPANY INCORPORATED; A, B, C, D, E, F, G, H, I, J, K, L, M, N, O, P, Q, and R, as follows:

80. Plaintiff realleges all of the allegations contained in paragraphs 1 through 79 of the GENERAL ALLEGATIONS and FIRST CAUSE OF ACTION as if fully set out herein and further states as follows:

81. Plaintiff further alleges that the injuries and subsequent death of Joe Ed Daniel was proximately caused by the negligence of the Defendants PANDORA MANUFACTURING, INC., formerly known as SNAP PRODUCTS, INC.; SNAP PRODUCTS, INC.; SNAP AUTOMOTIVE PRODUCTS, INC.; HUGHTONE INDUSTRIES, INC.; PAUL HUGHETT; MONTFORT A. JOHNSEN AND ASSOCIATES, LTD.; MONTFORT A. JOHNSEN; SAFETY CONSULTING ENGINEERS, INC.; JAMES C. DAHN; PENNZOIL – QUAKER STATE COMPANY (f/k/a PENNZOIL PRODUCTS COMPANY); NATIONWIDE INDUSTRIES, INC.; SAM McINNIS; MICHAEL BORKA; TIM SHINGLETON; AEROFIL TECHNOLOGY, INC.; SWEAT TIRE COMPANY INCORPORATED; A, B, C, D, E, F, G, H, I, J, K, L, M, N, O, P, Q, and R, in one or more of the following respects:

a. Negligently formulating and/or manufacturing the **"fix a flat NON-EXPLOSIVE FORMULA"** involved in the accident made the basis of this suit;

b. Negligently selling, supplying and/or distributing the **"fix a flat NON-EXPLOSIVE FORMULA"** made the basis of this suit when the Defendants knew or in the exercise of reasonable care, should have known that said product referred to above was in a defective and unreasonably dangerous condition;

c. Negligently selling, supplying and/or distributing a flammable and explosive product when other non-flammable and non-explosive formulations were available in the marketplace for the purpose of providing emergency and/or temporary tire repairs;

d. Negligently failing to provide adequate warnings to the decedent and others similarly situated as to inherent dangers associated with the use *of* **"fix a flat NON-EXPLOSIVE FORMULA"** of which the Defendants were aware;

e. Negligently failing to warn the decedent and others similarly situated of the dangerous, flammable and explosive propensities of the **"fix a flat NON-EXPLOSIVE FORMULA"** made the basis of this suit;

f. Negligently labeling and/or packaging the **"fix a flat NON-EXPLOSIVE FORMULA"** made the basis of this suit;

g. Negligently failing to adequately test the explosiveness and/or flammability of the **"fix a flat NON-EXPLOSIVE FORMULA"** made the basis of this suit;

h. Negligently failing to adequately test the **"fix a flat NON-EXPLOSIVE FORMULA"** to determine that it was safe for its intended uses and purposes;

i. Negligently misrepresenting that the **"fix a flat NON-EXPLOSIVE FORMULA"** made the basis of this suit was a *Non-explosive Formula*, when the Defendants knew or should have known of its dangerous flammable and/or explosive characteristics;

j. Negligently continuing to manufacture, sell, supply and/or distribute **"fix a flat NON-EXPLOSIVE FORMULA"** after said product was known by the Defendants to be flammable, explosive and unreasonably dangerous for its intended uses;

k. Negligently continuing to manufacture, sell, supply and/or distribute **"fix a flat NON-EXPLOSIVE FORMULA"** which was extremely flammable and explosive after a safe formulation was available;

l. Negligently failing to take appropriate measures to remedy the defective nature of the **"fix a flat NON-EXPLOSIVE FORMULA"** made the basis of this suit;

m. Negligently failing to remove and/or recall **"fix a flat NON-EXPLOSIVE FORMULA"** from the marketplace after becoming aware of the flammable, explosive and unreasonably dangerous propensities of the product.

WHEREFORE, Plaintiff PAMELA ALICE LITTLE DANIEL, Administratrix of the Estate of JOE ED DANIEL, Deceased, demands judgment against the Defendants PANDORA MANUFACTURING, INC., formerly known as SNAP PRODUCTS, INC.; SNAP PRODUCTS, INC.; SNAP AUTOMOTIVE PRODUCTS, INC.; HUGHTONE INDUSTRIES, INC.; PAUL HUGHETT; MONTFORT A. JOHNSEN AND ASSOCIATES, LTD.; MONTFORT A. JOHNSEN; SAFETY CONSULTING ENGINEERS, INC.; JAMES C. DAHN; PENNZOIL – QUAKER STATE COMPANY (f/k/a PENNZOIL PRODUCTS COMPANY); NATIONWIDE INDUSTRIES, INC.; SAM McINNIS; MICHAEL BORKA; TIM SHINGLETON; AEROFIL TECHNOLOGY, INC.; SWEAT TIRE COMPANY INCORPORATED; A, B, C, D, E, F, G, H, I, J, K, L, M, N, O, P, Q, and R, separately and severally, for punitive damages, for the wrongful death of the said Joe Ed Daniel, plus interest and costs in excess of the jurisdictional limits of this Court.

THIRD CAUSE OF ACTION

Plaintiff PAMELA ALICE LITTLE DANIEL, Administratrix of the Estate of JOE ED DANIEL, Deceased, alleges against the Defendants PANDORA MANUFACTURING, INC., formerly known as SNAP PRODUCTS, INC.; SNAP PRODUCTS, INC.; SNAP AUTOMOTIVE PRODUCTS, INC.; HUGHTONE INDUSTRIES, INC.; PAUL HUGHETT; MONTFORT A. JOHNSEN AND ASSOCIATES, LTD.; MONTFORT A. JOHNSEN; SAFETY CONSULTING ENGINEERS, INC.; JAMES C. DAHN; PENNZOIL – QUAKER STATE COMPANY (f/k/a PENNZOIL PRODUCTS COMPANY); NATIONWIDE INDUSTRIES, INC.; SAM McINNIS; MICHAEL BORKA; TIM SHINGLETON; AEROFIL TECHNOLOGY, INC.; SWEAT TIRE COMPANY INCORPORATED; A, B, C, D, E, F, G, H, I, J, K, L, M, N, O, P, Q, and R, as follows:

82. Plaintiff realleges all of the allegations contained in paragraphs 1 through 81 of the GENERAL ALLEGATIONS and FIRST AND SECOND CAUSES OF ACTION as if set forth fully herein.

83. Plaintiff further alleges that the injuries and subsequent death of the said Joe Ed Daniel was proximately caused by the wanton conduct of the Defendants PANDORA MANUFACTURING, INC., formerly known as SNAP PRODUCTS, INC.; SNAP PRODUCTS, INC.; SNAP AUTOMOTIVE PRODUCTS, INC.; HUGHTONE INDUSTRIES, INC.; PAUL HUGHETT; MONTFORT A. JOHNSEN AND ASSOCIATES, LTD.; MONTFORT A. JOHNSEN; SAFETY CONSULTING ENGINEERS, INC.; JAMES C. DAHN; PENNZOIL – QUAKER STATE COMPANY (f/k/a PENNZOIL PRODUCTS COMPANY);

NATIONWIDE INDUSTRIES, INC.; SAM McINNIS; MICHAEL BORKA; TIM SHINGLETON; AEROFIL TECHNOLOGY, INC.; SWEAT TIRE COMPANY INCORPORATED; A, B, C, D, E, F, G, H, I, J, K, L, M, N, O, P, Q, and R, in one or more of the following respects:

a. Wantonly formulating and/or manufacturing the **"fix a flat NON-EXPLOSIVE FORMULA"** involved in the accident made the basis of this suit;

b. Wantonly selling, supplying and/or distributing the **"fix a flat NON-EXPLOSIVE FORMULA"** made the basis of this suit when the Defendants knew or in the exercise of reasonable care, should have known that said product referred to above was in a defective and unreasonably dangerous condition;

c. Wantonly selling, supplying and/or distributing a flammable and explosive product when other non-flammable and non-explosive formulations were available in the marketplace for the purpose of providing emergency and/or temporary tire repairs;

d. Wantonly failing to provide adequate warnings to the decedent and others similarly situated as to inherent dangers associated with the use of **"fix a flat NON-EXPLOSIVE FORMULA"** of which the Defendants were aware;

e. Wantonly failing to warn the decedent and others similarly situated of the dangerous, flammable and explosive propensities of the **"fix a flat NON-EXPLOSIVE FORMULA"** made the basis of this suit;

f. Wantonly labeling and/or packaging the **"fix a flat NON-EXPLOSIVE FORMULA"** made the basis of this suit;

g. Wantonly failing to adequately test the explosiveness and/or flammability of the **"fix a flat NON-EXPLOSIVE FORMULA"** made the basis of this suit;

h. Wantonly failing to adequately test the **"fix a flat NON-EXPLOSIVE FORMULA"** to determine that it was safe for its intended uses and purposes;

i. Wantonly misrepresenting that the **"Fix-A-Flat NON-EXPLOSIVE FORMULA"** made the basis of this suit was a *Non-explosive Formula*, when the Defendants knew or should have known of its dangerous flammable and/or explosive characteristics;

j. Wantonly continuing to manufacture, sell, supply and/or distribute **"fix a flat"** as a **"NON-EXPLOSIVE FORMULA"** after said product was known by the Defendants to be flammable, explosive and unreasonably dangerous for its intended uses;

k. Wantonly continuing to manufacture, sell, supply and/or distribute **"fix a flat NON-EXPLOSIVE FORMULA"** which was extremely flammable and explosive after a safe formulation was available;

l. Wantonly failing to take appropriate measures to remedy the defective nature of the **"fix a flat NON-EXPLOSIVE FORMULA"** made the basis of this suit;

m. Wantonly failing to remove and/or recall **"fix a flat NON-EXPLOSIVE FORMULA"**

from the marketplace after becoming aware of the flammable, explosive and unreasonably dangerous propensities of the product.

WHEREFORE, Plaintiff PAMELA ALICE LITTLE DANIEL, Administratrix of the Estate of JOE ED DANIEL, Deceased, demands judgment against the Defendants PANDORA MANUFACTURING, INC., formerly known as SNAP PRODUCTS, INC.; SNAP PRODUCTS, INC.; SNAP AUTOMOTIVE PRODUCTS, INC.; HUGHTONE INDUSTRIES, INC.; PAUL HUGHETT; MONTFORT A. JOHNSEN AND ASSOCIATES, LTD.; MONTFORT A. JOHNSEN; SAFETY CONSULTING ENGINEERS, INC.; JAMES C. DAHN; PENNZOIL – QUAKER STATE COMPANY (f/k/a PENNZOIL PRODUCTS COMPANY); NATIONWIDE INDUSTRIES, INC.; SAM McINNIS; MICHAEL BORKA; TIM SHINGLETON; AEROFIL TECHNOLOGY, INC.; SWEAT TIRE COMPANY INCORPORATED; A, B, C, D, E, F, G, H, I, J, K, L, M, N, O, P, Q, and R, separately and severally, for punitive damages, for the wrongful death of the said Joe Ed Daniel, plus interest and costs in excess of the jurisdictional limits of this Court.

FOURTH CAUSE OF ACTION

PAMELA ALICE LITTLE DANIEL, Administratrix of the Estate of JOE ED DANIEL, Deceased, alleges against the Defendants SWEAT TIRE COMPANY INCORPORATED, M, N, O, P, Q, and R, as follows:

84. Plaintiff realleges all of the allegations contained in paragraphs 1-83 of the GENERAL ALLEGATIONS and FIRST, SECOND, and THIRD CAUSES OF ACTION as if fully set out herein.

85. Plaintiff further alleges that the injuries and subsequent death of the said Joe Ed Daniel was proximately caused by the negligence of the Defendants SWEAT TIRE COMPANY, INCORPORATED, M, N, O, P, Q and/or R, as follows:

a. Negligently altering the configuration of the tire and rim assembly involved in the accident made the basis of this suit;

b. Negligently converting the tire and rim assembly involved in the accident made the basis of this suit from a "tube-type" assembly to a "tubeless" assembly.

WHEREFORE, Plaintiff PAMELA ALICE LITTLE DANIEL, Administratrix of the Estate of JOE ED DANIEL, deceased, demands judgment against the Defendants SWEAT TIRE COMPANY, INCORPORATED, M, N, O, P, Q and R, separately and severally, for punitive damages, for the wrongful death of the said Joe Ed Daniel, plus interest and costs in excess of the jurisdictional limits of this Court.

FIFTH CAUSE OF ACTION

PAMELA ALICE LITTLE DANIEL, Administratrix of the Estate of JOE ED DANIEL, Deceased, alleges against the Defendants SWEAT TIRE COMPANY, INCORPORATED, M, N, O, P, Q and R, as follows:

86. Plaintiff realleges all of the allegations contained in paragraphs 1 through 85 of the GENERAL ALLEGATIONS and FIRST, SECOND, THIRD, AND FOURTH CAUSES OF ACTION as if fully set out herein and further states as follows:

87. Plaintiff further alleges that the injuries and subsequent death of the said Joe Ed Daniel was proximately caused by the wanton conduct of the Defendants SWEAT TIRE COMPANY, INCORPORATED, M, N, O, P, Q and/or R, as follows:

a. Wantonly altering the configuration of the tire and rim assembly involved in the accident made the basis of this suit;

b. Wantonly converting the tire and rim assembly involved in the accident made the basis of this suit from a "tube-type" assembly to a "tubeless" assembly.

SIXTH CAUSE OF ACTION

PAMELA ALICE LITTLE DANIEL, Administratrix of the Estate of JOE ED DANIEL, Deceased, alleges against Defendants PANDORA MANUFACTURING, INC., formerly known as SNAP PRODUCTS, INC.; SNAP PRODUCTS, INC.; SNAP AUTOMOTIVE PRODUCTS, INC.; HUGHTONE INDUSTRIES, INC.; PAUL HUGHETT; MONTFORT A. JOHNSEN AND ASSOCIATES, LTD.; MONTFORT A. JOHNSEN; SAFETY CONSULTING ENGINEERS, INC.; JAMES C. DAHN; PENNZOIL – QUAKER STATE COMPANY (f/k/a PENNZOIL PRODUCTS COMPANY); NATIONWIDE INDUSTRIES, INC.; SAM McINNIS; MICHAEL BORKA; TIM SHINGLETON;

AEROFIL TECHNOLOGY, INC.; SWEAT TIRE COMPANY INCORPORATED; A, B, C, D, E, F, G, H, I, J, K, L, M, N, O, P, Q, and R, as follows:

88. Plaintiff realleges all of the allegations contained in paragraphs 1 through 87 of the GENERAL ALLEGATIONS and FIRST, SECOND, AND THIRD CAUSES OF ACTION as if fully set out herein and further states as follows:

89. Plaintiff further alleges that the injuries and subsequent death of Joe Ed Daniel was proximately caused by a civil conspiracy among two or more defendants combining to exercise wanton reckless indifference to the safety of members of the public, including plaintiff's decedent, as follows:

a. Wantonly formulating and/or manufacturing the **"fix a flat NON-EXPLOSIVE FORMULA"** involved in the accident made the basis of this suit;

b. Wantonly combining to misrepresent that the **"fix a flat NON-EXPLOSIVE FORMULA"** made the basis of this suit was a "non-explosive formula," when the defendants knew or should have known of its dangerous flammable and/or explosive characteristics;

c. Wantonly combining to selectively edit and/or alter test results confirming the explosiveness of the **"fix a flat NON-EXPLOSIVE FORMULA"** tire inflator to create the false impression that the product was not flammable or explosive;

d. Wantonly combining to ignore test results from credible sources indicating the **"fix a flat NON-EXPLOSIVE FORMULA"** tire inflator product was, in fact, explosive;

e. Wantonly combining to fail to recall the **"fix a flat NON-EXPLOSIVE FORMULA"** tire inflator product when confronted with substantial information indicating the product posed a dangerous fire/explosion risk;

f. Wantonly combining to contrive testing procedures to give a false impression that the **"fix a flat NON-EXPLOSIVE FORMULA"** tire inflator product was somehow "safe," "non-flammable," or "non-explosive";

g. Wantonly combining to tout testing protocols for the **"fix a flat NON-EXPLOSIVE FORMULA"** tire inflator product which defendants knew were "largely irrelevant," "invalid," and not applicable to tire inflator products in order to create a false impression that the **"fix a flat NON-EXPLOSIVE FORMULA"** tire inflator made the basis of this suit was somehow "safe," "non-flammable," or "non-explosive";

h. Wantonly combining to visit concerned retail customers to falsely convey that the **"fix a flat NON-EXPLOSIVE FORMULA"** tire inflator product could not explode tires when defendants knew otherwise;

i. Wantonly failing to remove and/or recall the **"fix a flat NON-EXPLOSIVE FORMULA"** from the marketplace after becoming aware of the flammable, explosive and unreasonably dangerous propensities of the product.

WHEREFORE, plaintiff Pamela Alice Little Daniel, Administratrix of the Estate of Joe Ed Daniel, deceased, demands judgment against the defendants PANDORA MANUFACTURING, INC., formerly known as SNAP PRODUCTS, INC.; SNAP PRODUCTS, INC.; SNAP AUTOMOTIVE PRODUCTS, INC.; HUGHTONE INDUSTRIES, INC.; PAUL HUGHETT; MONTFORT A. JOHNSEN AND ASSOCIATES, LTD.; MONTFORT A. JOHNSEN; SAFETY CONSULTING ENGINEERS, INC.; JAMES C. DAHN; PENNZOIL – QUAKER STATE COMPANY (f/k/a PENNZOIL PRODUCTS COMPANY); NATIONWIDE INDUSTRIES, INC.; SAM McINNIS; MICHAEL BORKA; TIM SHINGLETON; AEROFIL TECHNOLOGY, INC.; SWEAT TIRE COMPANY INCORPORATED; A, B, C, D, E, F, G, H, I, J, K, L, M, N, O, P, Q, and R, separately and severally, for punitive damages, for the wrongful death of the said Joe Ed Daniel, plus interest and costs in excess of the jurisdictional limits of this Court.

Dated this 28th day of May, 1999.

* * *

Supreme Court U.S.
FILED
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(3)

No. 01-1290

IN THE

Supreme Court of the United States

SAM MCINNIS AND TIM SHINGLETON,
Petitioners,

v.

PAMELA ALICE LITTLE DANIEL, AS ADMINISTRATRIX OF THE ESTATE OF JOE ED DANIEL,
Respondent.

On Petition For A Writ Of Certiorari To The Supreme Court Of Alabama

REPLY BRIEF FOR PETITIONERS

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REPLY BRIEF FOR PETITIONERS

All but conceding that the questions presented in the petition are worthy of this Court's review, respondent devotes the bulk of her brief in opposition to a strained attempt to manufacture procedural objections to a grant of certiorari. Respondent makes no effort to dispute the existence of the multiple conflicts implicated by the decision below, and for good reason. The petition amply demonstrates the widespread divisions of authority over the questions presented and the substantial and recurring importance of the issues raised in this case. Respondent's half-hearted efforts to defend the judgment below and to conceal the significance of the Supreme Court of Alabama's holdings are wholly unpersuasive, and provide no justification for a denial of certiorari.

As demonstrated below, respondent's jurisdictional and "prudential" objections are without merit. An unbroken line of this Court's precedents clearly establishes the principle that decisions by a state's highest court granting or denying an original application for an extraordinary writ constitute "final judgments" for purposes of this Court's jurisdiction. The Supreme Court of Alabama's decision falls squarely into that category. Moreover, the decision below categorically announces rules of law to govern personal jurisdiction inquiries in the Alabama courts, and accordingly there are no prudential objections to this Court's review.

I. Respondent's Jurisdictional And "Prudential" Arguments Are Without Merit

Respondent's principal objection to a grant of certiorari is her claim that the judgment below is "interlocutory" and, accordingly, that this Court lacks jurisdiction under 28 U.S.C. § 1257(a). Respondent's argument is foreclosed by this Court's precedents.

The jurisdiction of the Supreme Court of Alabama below was invoked by the filing of an original petition for a writ of mandamus, not by way of interlocutory appeal. Pet. App. 1a, 2a. Under Alabama law, a mandamus proceeding of this type

is a distinct and separate case in its own right: "'With us mandamus is a civil proceeding or remedy, commenced by petition, and the petition constitutes the first pleading in the case.'" *Lawson v. Swift*, 191 So. 2d 379, 382 (Ala. 1966) (quoting *Alabama ex rel. Gaston v. Cunninghame*, 113 So. 309, 312 (Ala. 1927)). A petition for a writ of mandamus seeking to correct a trial court's error is not the functional equivalent of an interlocutory appeal; the writ of mandamus is instead an "'extraordinary remedy'" that "can not be used as a substitute for appeal." *Ex parte Stone*, 502 So. 2d 683, 685 (Ala. 1987) (citations omitted).

In these circumstances, this Court has repeatedly and consistently held that a state supreme court's disposition of an application for an extraordinary writ such as mandamus constitutes a "final judgment" within the meaning of 28 U.S.C. § 1257(a), regardless of whether further proceedings remain to be conducted in the underlying dispute between the parties. As this Court explained in *Detroit & Mackinac Railway Co. v. Michigan Railroad Commission*, 240 U.S. 564, 571 (1916), "it is settled that a proceeding in mandamus is an independent adversary suit, and a judgment awarding or refusing the writ is a final judgment within the meaning of the statute." The cases stating and reaffirming this well-established principle are legion.[1]

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[1] *See, e.g., Fisher v. District Court*, 424 U.S. 382, 385 n.7 (1976); *Madruga v. Superior Court*, 346 U.S. 556, 557 n.1 (1954); *Largent v. Texas*, 318 U.S. 418, 421-22 (1943); *Bandini Petroleum Co. v. Superior Court*, 284 U.S. 8, 14 (1931); *Michigan Cent. R.R. Co. v. Mix*, 278 U.S. 492, 494 (1929); *Missouri ex rel. St. Louis, B. & M. Ry. Co. v. Taylor*, 266 U.S. 200, 206 (1924); *Mt. Vernon-Woodbury Cotton Duck Co. v. Alabama Interstate Power Co.*, 240 U.S. 30, 31 (1916); *Weston v. City Council of Charleston*, 27 U.S. (2 Pet.) 449, 464-65 (1829); *accord Board of Educ. v. Superior Court*, 448 U.S. 1343, 1346 (1980) (Rehnquist, J., in chambers); *see generally* R. Stern, *et al.*, SUPREME COURT PRACTICE 108 (7th ed. 1993).

Respondent nonetheless attempts to avoid the plain import of these cases, asserting that this well-established finality principle is applicable only if the state court's resolution of the original writ proceeding also had the effect of finally resolving a disputed issue *in the separate underlying action*. Opp. 10-13. Respondent is unable to point to a single case that announces or even suggests any such exception to the finality of original writ determinations, because no such exception exists.

Indeed, respondent's argument is squarely foreclosed by the rationale of the cases cited above. Simply put, the justification for treating original writ decisions as final has nothing to do with the perceived impact of those decisions on the separate underlying lawsuit between the parties. Rather, the dispositive point is that an original writ proceeding is a *separate and distinct case*, and thus a state supreme court decision granting or denying such a writ is final *without regard to* the effect of that decision on the separate ongoing litigation between the parties. This Court's cases repeatedly express this unambiguous rationale for their jurisdictional holdings, and that rationale compels a finding of jurisdiction here. *See, e.g.*, *Bandini Petroleum*, 284 U.S. at 14 ("[t]he proceeding for a writ of prohibition is a distinct suit, and the judgment finally disposing of it is a final judgment"); *Missouri ex rel. St. Louis, B. & M. Ry. Co. v. Taylor*, 266 U.S. at 206 ("The application for a writ of prohibition is an independent adversary suit which was finally determined by the judgment under review."); *Detroit & Mackinac Ry. Co.*, 240 U.S. at 571 ("it is settled that a proceeding in mandamus is an independent adversary suit, and a judgment awarding or refusing the writ is a final judgment within the meaning of the statute"); *Mt. Vernon-Woodbury*, 240 U.S. at 31 ("Prohibition is a distinct suit and the judgment finally disposing of it is a final judgment .... The fact that it does not decide the merits of the principal suit is immaterial.").

Indeed, the argument advanced by respondents was expressly rejected by no less an authority than Chief Justice Marshall in his opinion for the Court in *Weston v. City Coun-*

cil of Charleston, 27 U.S. (2 Pet.) 449 (1829). In that case, the Court made clear that the denial of an extraordinary writ is a "final judgment" regardless of whether it finally resolves the parties' dispute over the right in question:

> If [the term 'final judgment'] were applicable to those judgments and decrees only in which the right was finally decided . . ., the provisions of [the jurisdictional statute] would be confined within much narrower limits than the words import, or than congress could have intended. . . . The word "final" must be understood in the section under consideration, as applying to all judgments and decrees which determine the particular cause.

Id. at 464-65.

Subsequent decisions confirm this long-established understanding that a state supreme court's denial of an original writ is a "final judgment" notwithstanding the possibility that the parties could still litigate the same or related issues in a separate proceeding. In *Michigan Central Railroad Co. v. Mix*, 278 U.S. 492 (1929), for example, the petitioner claimed that a Missouri trial court lacked jurisdiction over it, and accordingly sought a writ of prohibition in the Missouri Supreme Court to prevent the trial court from proceeding with the underlying lawsuit. The writ "was denied without an opinion." *Id.* at 494. Under Missouri law, that denial had no res judicata effect. *Dahlberg v. Fisse*, 40 S.W.2d 606, 611 (Mo. 1931). Nonetheless, this Court held that "[t]hat judgment is final within the meaning of" the predecessor to 28 U.S.C. § 1257. 278 U.S. at 494.

More recently, in *Board of Education v. Superior Court*, 448 U.S. 1343 (1980) (Rehnquist, J., in chambers), then-Justice Rehnquist concluded that this Court would have jurisdiction to review the Supreme Court of California's denial of an application for a writ of mandamus and/or prohibition, even though that denial was without opinion and the questions at issue were still pending before the intermediate appellate court in the underlying case. *Id.* at 1344-45, 1347-48.

Relying on *Fisher v. District Court*, 424 U.S. at 385 n.7, Justice Rehnquist concluded that the "petition for a writ of mandamus and/or prohibition was a distinct lawsuit which was fully and finally determined by the California Supreme Court's judgment," and thus he was "persuaded that this Court would in all probability have jurisdiction over the present action." 448 U.S. at 1346.[2]

Thus, respondent is simply wrong in contending that the possibility of further litigation regarding personal jurisdiction in the state trial court proceeding renders the judgment below non-final. The Supreme Court of Alabama denied petitioners' original writ application in a published opinion that has precedential effect and that finally resolved the mandamus proceeding before the court. That judgment is unquestionably final under this Court's decisions.[3]

Respondent's "prudential" objections to a grant of certiorari are equally wide of the mark. The only case that respondent cites in support of this argument is *Rescue Army v. Municipal Court*, 331 U.S. 549 (1947), but that case is inapposite, as the reasons for declining jurisdiction there (namely, the complexities and lack of clarity in the regulatory scheme

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[2] *Accord, e.g., Largent v. Texas*, 318 U.S. at 421-22 ("The proceeding in the county court was a distinct suit. . . . The possibility that the appellant might obtain release by a subsequent and distinct proceeding . . . in the same or a different court of the State does not affect the finality of the existing judgment."); *see also Detroit & Mackinac Ry. Co.*, 240 U.S. at 571 ("as this court has said, 'all judgments and decrees which determine the particular cause' are final in the sense of the statute. . . . This view has prevailed through a century of practices in reviewing judgments and decrees dismissing causes . . . for . . . reasons not decisive of the merits.") (quoting *Weston*, 27 U.S. (2 Pet.) at 463-65).

[3] Respondent's suggestion (Opp. 13) that the finality of original writ decisions extends only to cases involving subject matter jurisdiction is, of course, patently incorrect. *See, e.g., Taylor*, 266 U.S. at 206 (denial of original writ petition challenging personal jurisdiction constitutes final judgment); *Mix*, 278 U.S. at 494 (same).

at issue and the ambiguities in the state court's construction thereof, *id.* at 551-52, 574-85) have no parallel here.

As even respondent reluctantly acknowledges (Opp. 15, 16-17 & n.7), moreover, this Court has frequently granted certiorari to review questions of personal jurisdiction addressed in pre-trial rulings by state high courts. *E.g.*, *Burnham v. Superior Court*, 495 U.S. 604, 608 (1990); *Asahi Metal Indus. Co., Ltd. v. Superior Court*, 480 U.S. 102, 108 (1987); *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286, 289-90 (1980); *Mix*, 278 U.S. at 494; *Taylor*, 266 U.S. at 206. Precisely the same considerations that justified the Court's exercise of jurisdiction in those cases are present here: The court below decided questions of federal constitutional law in a manner that dramatically expands the scope of state court jurisdiction and conflicts with decisions of numerous other courts. No "prudential" considerations militate against review here.

II. The Questions Presented Merit Plenary Review

1. The petition demonstrates the existence of a widespread division of authority over the degree of "relatedness" between a defendant's forum contacts and the plaintiff's cause of action that must be shown in order to establish specific personal jurisdiction. Pet. 11-16. Moreover, the petition shows that the decision below further exacerbates this preexisting conflict, because the court below virtually dispensed with the relatedness requirement altogether. Pet. 16-18.

Respondent makes no effort to dispute these points. Indeed, she does not (and cannot) contest petitioners' showing that the result below would necessarily have been different had the Supreme Court of Alabama adopted either the "proximate cause" test employed by the First Circuit and other courts or the Ninth Circuit's "but for" test. Pet. 17-18.

Nonetheless, respondent contends that "there is no need for this Court to engage in academic, abstract rumination about potential tests for 'arising out of' or 'related to.'" Opp. 23. But as the detailed and unrebutted discussion in the peti-

tion makes clear, those questions are far from "academic" or "abstract" in the context of this case. To the contrary, on this record the selection of the correct "relatedness" test would be dispositive of the personal jurisdiction issue. Accordingly, this case provides a perfect vehicle for resolving the wide conflict among the state and federal authorities over a question that arises with considerable frequency and that this Court has previously noted but not yet had an opportunity to resolve. *See* Pet. 9-11, 28-29. For this reason alone, review is clearly warranted.

2. Respondent offers no direct response to petitioners' showing (Pet. 18-24) that the Supreme Court of Alabama's decision to attribute to petitioners the "stream of commerce" activities of the corporate defendants conflicts with the decisions of numerous other courts. In an attempt to demonstrate the correctness of the judgment below, however, she seems to suggest that no such attribution occurred or, in the alternative, that this Court's precedents authorize attribution for personal jurisdiction purposes. Neither suggestion is correct.

Respondent first asserts that petitioners, "as directors of sales and later as owners and directors of the entire corporation, . . . purposefully marketed and sold in Alabama a dangerous . . . product," Opp. 8, and implies that jurisdiction in Alabama is therefore appropriate without regard to attribution principles. But as the amended complaint and respondent's own brief make clear, there is no allegation or evidence that petitioners *personally* engaged in each step of the manufacturing, marketing, and distribution process, and there is certainly no allegation or evidence that petitioners were *personally* involved in the production or sale of the particular unit or units of Fix-a-Flat that allegedly caused the injury at issue in this case. To the contrary, as even respondent ultimately admits, it was "Snap Products, Inc., and then Snap Automotive Products, Inc., [that] manufactured and sold an aerosol tire inflator product ('fix a flat') throughout the United States, including the State of Alabama." Opp. 5. Respondent's artful attempts to distort the record cannot hide the fact that the Supreme Court of Alabama's holding clearly

rests on the assumption that the manufacturing, distribution, and sales activities of the *corporate defendants* were attributable to petitioners—a holding that is squarely in conflict with the numerous decisions cited in the petition. *See* Pet. 18-19.

Respondent alternatively attempts to justify the use of attribution here, pointing to this Court's observation that "when commercial activities are 'carried on in behalf of' an out-of-state party those activities may sometimes be ascribed to the party . . . ." Opp. 26 (quoting *Burger King v. Rudzewicz*, 471 U.S. 462, 480 (1985). But absent piercing of the corporate veil (which is not at issue in this case), corporations do not carry on activities "in behalf of" their shareholders or officers—that is precisely the point of the cases cited in the petition that reject attribution in these very circumstances. Pet. 19-25. Respondent's attempt to take this isolated passage out of context cannot conceal the conflict between the decision below and the numerous cases cited by petitioners.

Indeed, if respondent's reference (Opp. 26, 29) to the discussion of attribution principles in *Burger King* and *Keeton v. Hustler Magazine, Inc.*, 465 U.S. 770 (1984), has any significance at all, it is only to confirm the need for this Court's review. In *Burger King* this Court expressly declined to "resolve the permissible bounds of such attribution." 471 U.S. at 480 n.22. Similarly, in *Keeton* the Court did not reach the question whether the corporate defendant's principal shareholder and officer was subject to personal jurisdiction together with the corporation. 465 U.S. at 781 n.13. Having previously recognized the unresolved nature of this question, this Court should take the opportunity afforded by this case to bring clarity to this area of the law and eliminate the conflict among the authorities engendered by the decision below.

In a last-ditch effort to defend the judgment below, respondent argues that the Alabama courts' assertion of personal jurisdiction can be justified by the "effects" test of *Calder v. Jones*, 465 U.S. 783 (1984). In the first place, of course, the court below did not rely on that theory, and thus

respondent's argument does nothing to underm. e the need for plenary review here. In any event, *Calder* did not authorize the attribution of corporate conduct to individual corporate shareholders or officers. To the contrary, *Calder* expressly held that the individual defendants' "contacts with California are not to be judged according to their employer's activities there." *Id.* at 790. The crucial fact in *Calder*—and one that is entirely absent here—is that the individual defendants in that case were "not charged with mere untargeted negligence. Rather, their intentional, and allegedly tortious, actions were expressly aimed at California," in that they wrote and edited an article "that they knew would have a potentially devastating impact upon respondent. And they knew that the brunt of that injury would be felt by respondent in" California. *Id.* at 789-90. Having "knowingly cause[d] the injury in California" through conduct "intentionally directed at a California resident" and "calculated to cause injury to [her]," the *Calder* defendants could not be heard to complain about the assertion of jurisdiction over them in California. *Id.* at 790, 791.

In this case, by contrast, there is no allegation or evidence that petitioners "knew" that respondent's decedent (or anyone else in Alabama) would suffer injury, let alone that petitioners intentionally engaged in conduct "calculated to cause injury to" decedent. *Calder*'s "effects" test has no application here, and provides no basis for denying review.

3. Respondent attempts to defend the Supreme Court of Alabama's erroneous reliance on "reprehensibility" as establishing minimum contacts (Opp. 25), but her argument serves only to confirm the need for this Court's review. Respondent relies on this Court's observation that the "reasonableness" of an assertion of jurisdiction may sometimes be established "upon a lesser showing of minimum contacts than would otherwise be required." *Burger King*, 471 U.S. at 477. But respondent overlooks the qualifying statement that directly precedes this language: "*Once it has been decided that a defendant purposefully established minimum contacts within the forum State*, these contacts may be considered in light of

other factors to determine whether the assertion of personal jurisdiction would comport with "fair play and substantial justice." *Id.* at 476 (citation omitted; emphasis added). Thus, the statement quoted by respondent does not stand for the proposition that factors such as "a State's interest in adjudicating the dispute" can make up for what would otherwise be the absence of minimum contacts. To the contrary, *Burger King* indicates that such factors are relevant only in determining whether "fair play and substantial justice" permit the assertion of jurisdiction—an inquiry that occurs only *after* the required showing of constitutionally sufficient minimum contacts has first been made.

In any event, even if there were some doubt about the proper interpretation of *Burger King* on this point, review would still be warranted. As explained in the petition (without contradiction from respondent), numerous courts of appeals have held that the *Burger King* "reasonableness" factors cannot be used to supplement an otherwise deficient showing of minimum contacts; those factors are instead wholly irrelevant unless and until the requisite minimum contacts have first been established. *See, e.g., Felch v. Transportes Lar-Mex SA DE CV*, 92 F.3d 320, 329 (5th Cir. 1996) ("[a]s [plaintiff] failed to establish sufficient 'minimum contacts' with Texas, we need not address whether the exercise of personal jurisdiction in this case would offend traditional notions of fair play and substantial justice"); *Omeluk v. Langsten Slip & Batbyggeri A/S*, 52 F.3d 267, 270-71 (9th Cir. 1995) ("[w]e do not discuss the 'reasonableness' criterion, because . . . it is plain that the first two criteria are not satisfied"); *see generally* Pet. 25-26 & n.11. Thus, respondent's reliance on her misguided interpretation of *Burger King* merely confirms the need for this Court's review to resolve the conflict created by the Supreme Court of Alabama's bizarre "reprehensibility" holding.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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No. 01-1290

IN THE

Supreme Court of the United States

SAM MCINNIS AND TIM SHINGLETON,
Petitioners,

v.

PAMELA ALICE LITTLE DANIEL, AS ADMINISTRATRIX OF THE ESTATE OF JOE ED DANIEL,
Respondent.

On Petition For A Writ Of Certiorari To The Supreme Court Of Alabama

SUPPLEMENTAL BRIEF FOR PETITIONERS

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SUPPLEMENTAL BRIEF FOR PETITIONERS

Pursuant to this Court's Rule 15.8, petitioners respectfully submit this supplemental brief to bring to the Court's attention "intervening matter not available at the time of [petitioners'] last filing." SUP. CT. R. 15.8. As discussed below, this Court's decision to defer consideration of the petition for a writ of certiorari in *DaimlerChrysler Aktiengesellschaft v. Olson*, No. 01-929 (pet. for cert. filed Dec. 19, 2001), apparently in order to consider that petition together with the petition for a writ of certiorari in *Southern Company v. Alderson*, No. 01-1200 (pet. for cert. filed Feb. 14, 2002), is a significant intervening fact that militates in favor of the Court's consideration (and grant) of this petition together with the petitions in *DaimlerChrysler* and *Southern Company*.

1. The petitions in both *DaimlerChrysler* and *Southern Company* present important questions regarding the federal due process limits on assertions of "general" personal jurisdiction over non-resident defendants. In addition, *DaimlerChrysler* also implicates the first question presented in this petition, namely, the proper test for "relatedness" in "specific" jurisdiction cases, a recurring and important issue that continues to divide the lower state and federal courts. *See* Pet. 9-18 & n.5; Pet. in *DaimlerChrysler*, No. 01-929, at 28-30.

On February 4, 2002, Southern Company *et al.* filed an *amici curiae* brief in the *DaimlerChrysler* case, suggesting that consideration of the *DaimlerChrysler* petition be deferred "until the petition for certiorari in *Southern Company* has been filed and is ripe for this Court's review." Br. *Amici Curiae* of Southern Company, *et al.*, in *DaimlerChrysler*, No. 01-929, at 5.

The petition in *DaimlerChrysler* was scheduled for consideration at this Court's April 19, 2002, conference, but was taken off that conference list last week. It appears likely, therefore, that the Court has decided to defer consideration of the *DaimlerChrysler* petition until the *Southern Company* pe-

tition is ripe for consideration at the May 16, 2002, conference, thereby permitting the Court to consider both petitions together.

2. In light of the Court's apparent decision to consider the personal jurisdiction issues in *DaimlerChrysler* and *Southern Company* at the same time, petitioners respectfully submit that the Court may also wish to consider the instant petition together with the *DaimlerChrysler* and *Southern Company* petitions, because all three cases raise significant questions regarding the scope of the due process limitations on state-court assertions of personal jurisdiction over nonresident defendants. Indeed, on April 19, 2002, DaimlerChrysler filed an *amicus curiae* brief in the *Southern Company* case, noting the interrelated nature of these three cases and suggesting that "this Court should give serious consideration to granting *all three* of these cases." Br. *Amicus Curiae* of DaimlerChrysler Aktiengesellschaft in *Southern Company*, No. 01-1200, at 8. As that *amicus* brief explains (*id.* at 8-10), the important questions presented in *McInnis* complement those at issue in *DaimlerChrysler* and *Southern Company*. In combination, these cases offer the Court an opportunity to bring meaningful clarity to this area of the law by resolving several important issues that have divided the lower courts in personal jurisdiction cases.

CONCLUSION

For the foregoing reasons and those set forth in the petition and reply brief, petitioners respectfully suggest that the Court should consider this petition together with the petitions in *DaimlerChrysler* and *Southern Company* and either grant all three petitions or, in any event, grant this petition and set the case for full briefing and argument.

Respectfully submitted.

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